SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 658

MAX SENIOR, APPELLANT,

vs.

GEORGE C. BRADEN, QUINCY A. DAVIS, CARLETON S. DARGUSCH, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1935.

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IN THE

SUPREME COURT OF OHIO

MAX SENIOR,

Plaintiff in Error,

vs.

GEORGE C. BRADEN, QUINCY A. DAVIS, JOHN S. EDWARDS and ANTHONY J. KRAUS, constituting the Tax Commission of Ohio; ROBERT HEUCK, as Auditor of Hamilton County, Ohio; and HARRY A. FREIBERG, as Treasurer of Hamilton County, Ohio,

Defendants in Error.

No. 24756

(Filed April 10, 1934.)

PETITION IN ERROR CLAIMING CONSTITUTIONAL QUESTIONS.

Plaintiff in error says that at the January, 1934, term of the Court of Appeals of Hamilton County, First Appellate District, to wit, on February 28, 1934, defendants in error recovered a judgment against plaintiff in error by the consideration of said court, in an action then pending therein, wherein plaintiff in error was defendant in error and defendants in error were plaintiffs in error, whereby said Court of Appeals reversed a judgment in

favor of plaintiff in error of the Common Pleas Court of Hamilton County, wherein plaintiff in error was plaintiff and defendants in error, or their predecessors in interest, were defendants, and ordered the petition of this plaintiff in error in said Common Pleas Court to be dismissed at plaintiff in error's cost, to all of which plaintiff in error duly excepted.

All of the original papers, pleadings and exhibits, including the bill of exceptions, and a certified transcript of the docket and journal entries in the courts below, are filed herewith and made a part of this petition in error.

In said case plaintiff in error sought an injunction against the County Auditor, the County Treasurer and the Tax Commission of Ohio to prevent the assessment or collection of taxes, under the provisions of the intangible tax law of Ohio, on certain land trust certificates owned by the plaintiff and enumerated in his petition filed in the Common Pleas Court, on the grounds that the statutes did not provide for the taxation of said certificates, and that insofar as they did, said statutes were unconstitutional in the following particulars, to wit:

1. Said statutes deny to plaintiff, a citizen of the United States and of the State of Ohio, the equal protection of the laws, and deprive him of his property without due process of law, in violation of plaintiff in error's rights under the Constitution of the United States and of Article XIV, Section 1 in addition to and amendment thereof, in that the statutes, including Sections 5323, 5389, and 5638 of the General Code of Ohio, as-

sessing and collecting taxes on plaintiff's equitable interests in land evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination without warrant of law, inasmuch as all other equitable interests in land not so evidenced, and all legal interests in land, whether so evidenced or not, are expressly exempted by statute from taxation.

2. Said statutes, insofar as they purport to tax the plaintiff in error's interest in the lands evidenced by said land trust certificates constitute double and unequal taxation in violation of the Constitution of Ohio and Sections 2 and 5 of Article XII thereof, inasmuch as the lands in which plaintiff has an equitable interest have been assessed in the names of the legal owners or lessees thereof according to value without any deduction or diminution by reason of plaintiff's interest in said lands, and the taxes have been paid by the owners or lessees thereof.

3. Said statutes violate Section 2 of Article XII of the Constitution of Ohio, which provides that "land and improvements thereon shall be taxed by uniform rule according to value".

4. The levying and collection of taxes on plaintiff in error's equitable interest in real estate situated outside of Ohio, to wit, in Chicago, Illinois, Omaha, Nebraska, and Boston, Massachusetts, are an attempt to levy and collect taxes on real property wholly outside of the State of Ohio, are beyond the taxing power of the State of Ohio, and amount to a taking of private property without due process of law, in violation of plaintiff's rights under Section 16 of Article I of the Constitution of the State

of Ohio, and of Article XIV, Section 1 in addition to and amendment of the Constitution of the United States.

The Court of Common Pleas held that said statutes purported to tax plaintiff's interests in land represented by said land trust certificates, and held, further, that said statutes were unconstitutional on the grounds that said statutes, as so applied, violated the plaintiff's rights guaranteed by the Constitutions of the State of Ohio and of the United States of America, as claimed by plaintiff in error, and rendered judgment for plaintiff accordingly. The Court of Appeals reversed said judgment of the Common Pleas Court and ordered plaintiff's petition in error dismissed, on the ground that the Court of Common Pleas erred in holding that Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in lands and rents derived therefrom, when such interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereof.

There is error in said record and proceedings in this, to wit:

(a) Said Court of Appeals erred in reversing and not affirming the aforesaid judgment of the Court of Common Pleas.

(b) Said Court of Appeals erred in holding that the aforementioned section of the General Code of Ohio, constituting part of the intangible tax law, applied to plaintiff's interests in said property, and that it was not in violation of the plaintiff's rights guaranteed by the Constitution of the State of Ohio in each of the particulars hereinbefore set forth.

(c) Said Court of Appeals erred in holding that the aforementioned section of the General Code of Ohio, constituting part of the intangible tax law, applied to plaintiff's interests in said property, and that it was not in violation of the plaintiff's rights guaranteed by the Constitution of the United States of America and of Article XIV, Section 1 in addition to and amendment thereof, in each of the particulars hereinbefore set forth.

(d) Said Court of Appeals erred in holding that plaintiff's interest in the certificate of interest in ground rent on the property on which the Lincoln Inn Court Building is situated was subject to taxation under Section 5323 and other sections of the General Code of Ohio, inasmuch as plaintiff's interest therein is a legal interest and not an equitable interest and is, therefore, not within the scope of said Section 5323.

(e) The Court of Appeals erred in denying the application for rehearing of defendant in error (plaintiff in error herein).

(f) The judgment of the Court of Appeals is contrary to law and in violation of plaintiff in error's constitutional rights under the Constitutions of Ohio and also of the United States.

Plaintiff in error therefore prays that said judgment of the Court of Appeals may be reversed and the judgment of the Common Pleas Court affirmed, and that he be restored to all things he has lost by reason of said judgment of the Court of Appeals.

PAXTON & SEASONGOOD,
Attorneys for Plaintiff in Error.

Summons in error is waived and appearance of defendants in error is hereby entered.

LOUIS J. SCHNEIDER,
Prosecuting Attorney of Hamilton County, Ohio.

WALTER M. LOCKE,
Assistant Prosecuting Attorney in Charge of Civil Division.

Attorneys for Robert Heuck, as Auditor of Hamilton County, Ohio, and Harry A. Freiberg, as Treasurer of Hamilton County, Ohio, Defendants in Error.

THOMAS C. LAVERY,
Special Attorney for George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, constituting the Tax Commission of Ohio, Defendants in Error.

JOHN W. BRICKER,
Attorney General of the State of Ohio, as Attorney for the Tax Commission of Ohio.

ORDER AUTHORIZING PLAINTIFF IN ERROR TO DISPENSE WITH THE PRINTING OF CERTAIN EXHIBITS.

(Entered May 8, 1934.)

It appearing to the court that the record in this case contains many exhibits, the contents of which are similar, and while they may be material to the issues in the case it will be very costly to print and reproduce them and by reason whereof counsel for the respective parties herein have agreed that the record herein may be printed without the inclusion of Exhibits 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18, 20, 22, and those parts of Exhibits 10 and 19 which are duplicated by Exhibits 2 and 7, respectively, may be omitted; and

It further appearing to the court that counsel for the respective parties herein have agreed that the decision of this court with respect to the land trust certificate set forth in Exhibit 7 shall be applied to the other certificates of equitable ownership in Ohio real estate in this case, excluding the certificate of interest in ground rent of Lincoln Inn Court Building set forth in Exhibit 1, and that the decision of this court with respect to the land trust certificate set forth in Exhibit 2 shall be applied to the other certificates of equitable ownership in this case in real estate situated outside the State of Ohio;

It Is, Therefore, Ordered that the record in the within case may be printed without the inclusion of Exhibits 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18, 20, 22, and that those parts of Exhibits 10 and 19 which are duplicated by Exhibits 2 and 7, respectively, may be omitted, provided,

however, that all of the original exhibits may be referred to at the hearing in this cause before this Court.

Submitted by,

PAXTON & SEASONGOOD,
Attorneys for Plaintiff in Error.

Defendants in error hereby state that they have agreed with counsel for plaintiff in error in the matters hereinabove set forth and consent to the granting of the above order.

LOUIS J. SCHNEIDER,
Prosecuting Attorney of Hamilton County, Ohio.

WALTER M. LOCKE,
Assistant Prosecuting Attorney in Charge of Civil Division.
Attorneys for Robert Heuck, as Auditor of Hamilton County, Ohio, and Harry A. Freiberg, as Treasurer of Hamilton County, Ohio, Defendants in Error.

THOMAS C. LAVERY,
Special Attorney for George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, constituting the Tax Commission of Ohio, Defendants in Error.

JOHN W. BRICKER,
Attorney General of the State of Ohio, as attorney for the Tax Commission of Ohio.

Enter:

CARL V. WEYGANDT,
Chief Justice.

IN THE COURT OF APPEALS
Hamilton County, Ohio

No. 4397

GEORGE C. BRADEN, QUINCY A. DAVIS, JOHN S. EDWARDS and ANTHONY J. KRAUS, constituting the Tax Commission of Ohio; ROBERT HEUCK, as Auditor of Hamilton County, Ohio; and EDGAR FRIEDLANDER, as Treasurer of Hamilton County, Ohio,

Plaintiffs in Error,

vs.

MAX SENIOR,

Defendant in Error.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

Apr. 6, 1933. Petition in Error and original papers and Bill of Exceptions filed.

Apr. 6, 1933. Waiver of summons in error and appearance of Defendant in Error filed. (See Pet.)

Nov. 8, 1933. Brief on behalf of plaintiff in error filed.

Nov. 8, 1933. Two copies of Brief of Plaintiff in error filed.

Nov. 8, 1933. Receipt for Plaintiff in error filed.

Nov. 22, 1933. Brief on behalf of defendant in error filed.

Nov. 22, 1933. Two copies of Brief of defendant in error filed.

Nov. 22, 1933. Receipt for defendant in error brief filed.

Jan. 31, 1934. Application for a re-hearing filed, and two copies of same filed.

Feb. 1, 1934. Brief for the Dixie Terminal Co., (Amici Curiae) and two copies of same filed.

Feb. 1, 1934. Receipt for the above brief filed.

Feb. 5, 1934. Min 28. Application for a re-hearing is denied.

The application of the defendant in error for a rehearing of this cause is denied.

Feb. 28, 1934. Min. 57. Judgment entry of reversal at defendant's costs.

This cause came on for hearing upon the petition in error, the transcript, the bill of exceptions, and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by Counsel; and, on consideration thereof, the Court find that there is error apparent upon the record in the proceedings of said Court to the prejudice of the plaintiffs in error in this, to-wit:

That the Court of Common Pleas erred in holding that Section 5323 of the General Code of Ohio insofar as it purports to tax equitable interests in lands and rents derived therefrom when such interests are evidenced by transferable certificates, as illegal, unconstitutional and

void, violating the constitutions of the State of Ohio and of the United States of America and amendments thereto.

It is therefore considered and ordered by the Court that the judgment heretofore rendered in this cause by said Court of Common Pleas be, and the same hereby is, reversed and that the petition of this defendant in error in the Court below be, and the same hereby is, dismissed at the costs of the defendant in error.

To all of which the defendant in error, by his counsel, excepts.

And it appearing to the Court from the statements of counsel for the defendant in error that it is their desire and intention to file appropriate proceedings for review of the action of this Court in the Supreme Court of Ohio, it is ordered that the special mandate to be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution of this judgment be withheld and the injunction heretofore granted in this case by the Court of Common Pleas of Hamilton County, Ohio, may be, and the same hereby is continued in full force and effect, pending the final determination on review by the Supreme Court of Ohio.

Mar. 13, 1934. Min. 73. Entry substituting party plaintiff in error entered.

It appearing to the Court that, during the pendency of this action, Edgar Friedlander, as Treasurer of Hamilton County, Ohio, one of the parties plaintiff in error, ceased to hold such office and that Harry A. Freiberg was duly elected and is now acting as treasurer of Hamilton County, Ohio, and that said Harry A. Freiberg, as Treasurer of Hamilton County, Ohio, as aforesaid, should

be substituted for Edgar Friedlander as one of the parties plaintiff in error in this action.

It is therefore, ordered that said Harry A. Freiberg, as Treasurer of Hamilton County, Ohio, be, and he hereby is, substituted as a party plaintiff in error in lieu of Edgar Friedlander, as treasurer as aforesaid.

STATE OF OHIO,
COUNTY OF HAMILTON. } ss:

I, Peter J. McCarthy, Clerk of the Court of Appeals of Hamilton County, Ohio, do hereby certify the within and foregoing to be a true and correct Transcript of the Docket and Journal entries in the Case No. 4397, wherein George C. Braden, et als., were Plaintiffs in error and Max Senior the defendant in error as appears from the files and records now in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the Seal of said Court, at Cincinnati, this 29th day of March, A. D. 1934.

PETER J. MCCARTHY,
Clerk of the Court of Appeals of Hamilton County, Ohio.

By J. C. SPILLE, *Deputy.*

[SEAL]

PETITION IN ERROR.

(Filed April 6, 1933.)

Now come Plaintiffs in Error, George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, constituting the Tax Commission of Ohio; Robert

Heuck, as Auditor of Hamilton County, Ohio; and Edgar Friedlander, as Treasurer of Hamilton County, Ohio, and for their petition in error say that at the January Term, 1933, of the Court of Common Pleas, Hamilton County, Ohio, in a civil action therein pending, No. A-31247, on the dockets of said Common Pleas Court, wherein the defendant in error was plaintiff and these plaintiffs in error were defendants, by the consideration of said court said plaintiffs in error and their successors in office were perpetually enjoined from in any manner assessing or collecting or attempting to assess or collect from defendant in error any Ohio intangible property tax on defendant's in error legal or equitable interests in land represented by transferable certificates, known as Land Trust Certificates and from taking any steps whatever against defendant in error for the nonpayment thereof.

Journal entries and the original pleadings and papers including Bill of Exceptions are filed with this petition in error.

There is error in the said record and proceedings prejudicial to the rights of the plaintiffs in error, in this, to-wit:

1. The decision of the Court is not sustained by the evidence.
2. The decision of the Court is contrary to the evidence.
3. The decision of the Court is contrary to law.
4. The judgment of the Court should have been for the plaintiffs in error and against the defendant in error.
5. For other errors of law occurring at the trial and excepted to by the plaintiffs in error.

Wherefore, the plaintiffs in error pray that said judgment may be reversed and that they be restored to all things lost thereby.

LOUIS J. SCHNEIDER,
Prosecuting Attorney.

By WALTER M. LOCKE,
Ass't Prosecuting Attorney.

WAIVER OF SUMMONS IN ERROR.

Now comes the Defendant in Error, by his counsel, and hereby waives the issuance and service of summons and enters his appearance herein.

PAXTON & SEASONGOOD,
Counsel for Defendant in Error.

Per JOSEPH A. SEGAL.

APPLICATION FOR REHEARING.

(Application for rehearing presented 1/18/34.)

Now comes the defendant in error, by his counsel, and applies for a rehearing of this cause. It is respectfully submitted that said rehearing should be granted for the following reasons:

I. The Court placed its decision on grounds different from those argued by counsel and defendant in error requests the opportunity to present arguments and authorities on the points raised in the Court's opinion, which

were not fully briefed by counsel for either party nor presented in oral argument to the Court.

These points are as follows:

(a) This court held that it was controlled by *Rowe* v. *Braden*, 126 O. S. 533, as it interpreted that decision, in effect, to tax all equitable interests, no matter what might be the kind of property comprising the corpus. It is submitted that this court failed, in that finding, to observe a distinction between equitable interests in *intangibles* and equitable interests in chattels having a fixed situs or in real estate, which is necessarily immovable. This distinction is emphasized in all the authorities referred to by the court on this point. The *Rowe* case itself shows in the statement of facts (p. 535 of 126 O. S.):

> "The trust corpus consists wholly of stocks, bonds and cash . . .
>
> "The stocks, bonds and cash constituting the trust corpus are of a kind described by the General Code of Ohio as 'investments.'"

In the opinion of Judge Day (p. 542) appears this significant statement:

> "The situs of intangible property for the purpose of taxation is generally determined by the application of the maxim, 'mobilia sequuntur personam.'"

That is the basis of this decision. It decides nothing concerning equitable interests in chattels having a fixed situs or concerning interests in real estate. It relies on *Maguire* v. *Trefry*, 253 U. S. 12, which also involved only intangible personal property, to-wit: corporate bonds and certificates of the Southern Railway Equipment Trust, which are in the form of mortgage notes (p. 14 of

253 U. S.). It should be noted that even in *Maguire* v. *Trefry*, the securities which were taxed to the Pennsylvania trustee were held exempt from taxation in Massachusetts (p. 13). In the principal case it is admitted that all the real estate was taxed directly to the trustee or the lessee who paid the taxes for the trustee. Furthermore, the court in *Maguire* v. *Trefry*, on page 15, distinguished the case of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, in the following language (p. 15):

> "In that case we held that tangible, personal property, permanently located in another State than that of the owner, where it had acquired a situs, and was taxed irrespective of the domicile of the owner, —was beyond the taxing power of the State, and that an attempt to tax such property at the owner's domicile was a denial of due process of law under the Fourteenth Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the State of the owner's residence. In that case this court in the opinion of Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. (199 U. S. 211.)"

This shows conclusively that the court in *Maguire* v. *Trefry*, on which the *Rowe* case is based, was deciding nothing as to the equity in tangible personal property having a situs outside of the state, and, therefore, a fortiori concerning real estate.

In *Anderson* v. *Durr*, 100 O. S. 251, it was merely held that membership in the New York Stock Exchange was intangible property, a chose in action, and, therefore, could be taxed at the domicile of the owner as any other intangible personal property. The court nevertheless

recognized that the state had no power to tax personal property permanently situated in another state, citing *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 74, (p. 259 of 100 O. S.).

If we look at the decision of this court in *Anderson* v. *Durr*, 10 O. A., 329, per Shohl, J., we see that the first paragraph of the syllabus reads:

> "A membership in the New York Stock Exchange is property in the nature of a chose in action."

On pages 334 and 335 this court said:

> "There is no doubt that a state law which attempts to tax personal property permanently situated in another state is void",

citing *Southern Pacific Railway* v. *Kentucky, supra,* and other cases. This court went on to say, in contradistinction to the above, that:

> "The normal situs for purpose of taxation of a chose in action is at the domicile of the owner."

Anderson v. *Durr, supra,* went to the Supreme Court of the United States, the decision of which appears in 257 U. S. 99. The court held (p. 109) that the membership was personal property and having no fixed situs followed the owner. In the opinion of Judge Holmes, which appears as a doubt rather than a dissent, appears this significant statement (pp. 110 and 111):

> "But it is established that it is not enough that the subject, the owner of the right, is within the power of the taxing State. He cannot be taxed for land situated elsewhere, and the same is true of personal property permanently out of the jurisdic-

> tion. It does not matter, I take it, *whether the interest is legal or equitable,* or what the machinery by which it is reached, but the question is whether the object of the right is so local in its foundation and prime meaning that it should stand like an interest in land." (Italics ours.)

That is, if the court had found that the right to a seat in the New York Stock Exchange was an interest in land, then Ohio could not have taxed it, *whether that interest was legal or equitable.* This would be in accord with the previous decision of the Supreme Court in *Louisville & Jefferson Ferry Co.* v. *Kentucky,* 188 U. S. 535, which was distinguished in the *Durr* case (p. 108).

All that *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 74, held was that a vessel that had no permanent situs could be taxed at the domicile of the owner. It distinguished *Union Refrigerator Transit Company* v. *Kentucky,* 199 U. S. 194, on the ground that the railroad cars held exempt from tax in that case had acquired a permanent situs outside of Kentucky. The court said (p. 75):

> "It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular State, and quite another to attribute to a sea-going ship an actual situs at any particular port into which it goes for supplies or repairs or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port, but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation."

But *Union Refrigerator Transit Company* v. *Kentucky, supra,* is still the law in the United States Supreme Court and has been approved and followed as recently as 1925 in *Frick* v. *Pennsylvania,* 268 U. S. 473, long after the decisions in *Maguire* v. *Tiefry, supra,* and *Anderson* v. *Durr, supra.*

In the *Frick* case it was held that the state may not only not levy an inheritance tax on tangible property located permanently outside of the state, but may not even use such tangible property as a basis for the calculation of its inheritance tax.

In *First National Bank* v. *Maine,* 284 U. S. 312 (1932), the court said at page 326:

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax except by the state in which it is located."

As we shall show later, an equitable interest in real estate is just as much "real estate" or "land" as a legal interest therein and the Supreme Court of Ohio has repeatedly held that not more than one interest in real estate may be taxed. *Rowe* v. *Braden, supra,* therefore, does not control this case, as that involved only the tax of an equity in intangible personal property, the interest in which follows the owner wherever he may go, unlike immovable land or chattels having a permanent location, which are subject to a different rule.

(b) This court, in its opinion, assumed that the constitutional question involved in connection with the tax of an equitable interest in land located in Ohio, where the owner of the legal interest had already been taxed, is only a question of double taxation. But the question

is also regarding *uniformity* of taxation. Article XII, Section 2, of the Ohio Constitution, provides:

> "Land and improvements thereon shall be taxed by uniform rule according to value."

If one group of owners of interests in land is taxed on one basis and another group of owners of interests in land is taxed on another basis, that destroys uniformity.

(c) This court said (Opinion p. 12) that the particular section claimed to be discriminatory was not the section under which the tax was attempted to be levied. The General Assembly intended, under the provisions of Section 5323, to tax equitable interests in land evidenced by transferable certificates if it constitutionally could do so. The case was briefed and argued by both plaintiffs in error and defendant in error on the basis that this was the section under which the tax was levied and the court refers to no other section or provision which would be the basis for levying such a tax.

If there is no section specifically referring to this kind of property for taxation, then it is not taxed at all, *Chisholm* v. *Shields*, 67 O. S. 374. The court said in that case (p. 378):

> "The general assembly must be presumed to be able to fairly describe such property as it desires to tax, without resorting to a strained construction, or a course of fine reasoning."

In the case of *U. S.* v. *Merriam*, 263 U. S. 179, at 187, the court states:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax

is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 153. The rule is stated by Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122:

"'I am not at all sure that, in a case of this kind —a fiscal case—form is not amply sufficient; because, as I understand the principal of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'"

Counsel for defendant in error believe that it would be helpful to this court if a reargument were permitted, since this point was not considered, briefed or argued by counsel for either of the parties before the opinion of the court was handed down.

II. The decision of this case is of vast importance in the State of Ohio.

It tends to unsettle rights which had been acquired on the basis of previous opinions of the Attorney General and of opinions of courts of last resort of other states, as well as on the general conception and advice to clients

of the Bar with regard to land trust certificates. We realize that the court should not change its decision on this ground if convinced that its decision is correct, but we submit that it is a reason why reargument should be permitted if the Court has any reasonable doubt on the subject.

Since this decision was rendered, we have been spoken to by numerous lawyers in this city and we have heard by mail from lawyers in other cities who are disturbed at the effect this case may have on opinions previously given. *We know of no opinion or decision, previous to the opinion of this court, which holds a land trust certificate is not an interest in real estate or land.* If there were such an opinion or decision, it would surely have been cited by counsel for plaintiffs in error. Certainly the Bar, which must give opinions based on previous rulings of departments and courts, is entitled to know the ground of distinction from those opinions and decisions. The court should permit a rehearing and render a supplemental opinion, if only to show why the previous opinions of the Attorney General of Ohio and of the Supreme Court of Rhode Island and Maine, which seem to us squarely in point and contrary to this decision, are considered wrong and not worthy of being followed.

The syllabus of 1926 Opinions of Attorney General 375 reads:

> "Holders of land trust certificates issued under a declaration of trust executed by the Cleveland Trust Company of Cleveland, Ohio, as trustee, dated June 1, 1922, are not required to list said certificates for taxation."

In the course of his opinion, the Attorney General said (pp. 376, 377):

> "The land trust certificate is exactly what its name implies—a certificate evidencing an interest in the equitable ownership of land held in trust, and is, therefore, a real estate investment. It is not in any sense a mortgage, a leasehold bond or note, but is an evidence of actual ownership in whatever property may be trusteed as a basis for the issuance of any particular series or designation of certificates. The certificate is merely an evidence of the holder's simple individual share in the ownership of large parcels of property.
>
> "As these certificates are merely an evidence of ownership they have, of course, no par value or other fixed nominal value. Nothing but custom and convenience govern the price at which the certificates are sold and the interest which accrues thereupon. As the land trust certificate is merely an evidence of ownership, there is, of course, no such thing as maturity; and as it is merely evidence of equitable ownership of real estate, no personal property taxes are payable thereon.
>
> "In the case of *Morrison* v. *Manchester*, 58 N. H. 538, at page 563, it is stated that:
>
> > 'When an owner has left his farm in trust for his widow and children, and the trustee holding the legal title without any beneficial interest pays the farm taxes and expenses out of the farm income, and pays the rest of the income to the widow and children, a second tax for the same amount is not assessed on the equitable title of the widow and children. For the purpose of taxation the legal title of the trustees and the equitable title of the widow and children are not more than the whole title, legal and equitable, which the testator had in his lifetime. If the testator, dividing the equitable title and beneficial interest into four shares, gave two shares to his widow and one share to each of his two children, directed the trustee

to issue to them certificates as evidence of their respective rights in the trust property, the united title of the trustee and the widow and children would not be more than the title of the testator.'

"In *Sears on Trust Estates in Business Companies*, it is stated in section 114, at page 168, that:

'It seems impossible to find any case maintaining or attempting to maintain the proposition that the legal and equitable interest in the same property may both be taxed, at least where trustee and beneficiaries reside in the same state. On the contrary, all theory of this being lawful as to capital stock and shares of stock of a corporation is that they are distinct and independent properties, there being a legal interest in the former, and a legal interest in the latter, that is to say, diverse legal interests in different things. In a trust there is a legal interest and its dependency, an equitable interest. If the latter is destroyed, a beneficiary ceases to be, but the property resumes the status it had before the subsidiary interest began.'

"It is therefore believed that the holders of the land trust certificates authorized under the aforesaid declaration of trust are not required to list them for taxation.

"You further inquire if it would make any difference if the real estate in question was located outside of Ohio, or the trustee was a non-resident of this state; or if the trustee was a non-resident and the land was also without the state.

"It is believed that the said statement of changed status would make no difference in our answer as before herein stated.

"In *Sears Trust Estates*, page 168, it is stated that:

'Therefore it may be said that in the state where both trustees and cestui que trust reside one tax is all that may be imposed; and if they reside in different states, the tax is imposed where the property is held.'"

Later on, the Attorney General was called upon to determine the relation of dealers in land trust certificates to the Ohio Blue Sky Law and in 1926 Opinions, page 528, the following syllabus appears:

> "The sale of land trust certificates representing part of the equitable ownership in the premises to be occupied by the Bankers Building at Chicago, is a sale of foreign real estate and subject to the provisions of section 6373-15 of the General Code."

The direct question of the right of one state to impose a personal property tax on its resident, the owner of a land trust certificate on land located in another state, was first presented to a court of last resort in *Narragansett Mutual Fire Ins. Co.* v. *Burnham*, 51 R. I. 371, 154 Atl. 909 (1931). The land trust certificate involved was with reference to Cleveland, Ohio, property. The court analyzed the certificates, held that the holder of it had an interest in realty located outside of Rhode Island and that, therefore, Rhode Island could not tax this interest in immovable property located beyond its borders. The court said:

> "In our opinion the land trust certificate owned by the petitioner is not a security within the meaning of the statute but is a muniment of title to an equitable interest in real estate in Ohio. Such appears to be the status of these certificates in that State. No Ohio decision bearing upon this question has been called to our attention, due doubtless to the fact that no attempt has been made to tax them there as personal property under the advice of the attorney general that land trust certificates similar to those in the case before us represent an equitable interest in real estate and are not taxable as personal property. Opinion No. 3640 of the Attorney General of the State of Ohio."

In *Bates* v. *Decree of Court*, 131 Me. 176, 160 Atl. 222 (1932), it was held that a certificate of beneficial interest in a Massachusetts real estate trust was not subject to inheritance taxation by the State of Maine, on the ground that it was an interest in realty located in Massachusetts.

We do not contend that this court is bound by these opinions of the Attorney General or by these decisions of the courts of last resort of Rhode Island and Maine. Our point is that the Bar should be advised, for future opinions and other questions involving land trust certificates, such as their transfer, passing under wills, descent on intestacy and other matters, why this court thinks these opinions are not worthy of serious consideration. We submit that an analysis of the decision of our Supreme Court in the *Rowe* case, *supra*, or of the Supreme Court of the United States in *Maguire* v. *Trefry*, *supra*, will sustain the distinction from this case, as those courts in the cases last mentioned were concerned only with equitable interests in *intangible personal property*, the rule as to which is "mobilia sequuntur personam", while the rule as to taxation of immovables, such as land, is that they may be only taxed at their situs. And the rule for Ohio land is that an interest therein may not be taxed twice, while other real estate is only taxed once, for that destroys uniformity. It will not do to say that where the holder of a mortgage is taxed, as well as the owner of the land, that constitutes double taxation, because the holder of a mortgage is not taxed on his mortgage but on his note or bond, which is a valid chose in action without the mortgage. If he were given a mortgage for a non-

taxable right, such as an indemnity agreement, he would not be taxed on the mortgage. It is merely the note or bond, constituting a chose in action, for which the mortgage is only security, that is taxed. And a share of stock in a company is property of a distinct kind, created pursuant to statute, entirely separate and apart from any property that the corporation may have. See, *Ganson* v. *Heuck*, 45 O. App. 246 (Hamilton County), O. S. B. A. R. for September 25, 1933.

III. The decision of this Court is of vast importance to the citizens of this district because of the constitutional provision that it takes more than a majority of the Supreme Court of Ohio to reverse such a decision (Art. IV, Section 2), on a constitutional question.

Suppose two or three of the judges of the Supreme Court were to think the opinion rendered by this court correct and four or five should be of a different opinion. That would mean that the people of Hamilton County and the other counties in the First Judicial District would be subject to a tax, which the people of other counties, in which the courts followed the majority of the Supreme Court, would not be subject to. Therefore, this decision may become practically final and even discriminatory.

We realize that this is no argument why any court should change its convictions, but it is reason why this court in a case such as this should be willing to receive all the light it can get on the matters involved before it makes its decision irrevocably final.

In support of this application, we wish to present the following facts and authorities not previously cited or fully considered:

(A) A land trust certificate purports to represent a legal or equitable interest in land.

In the Clark-Randolph Building Site Land Trust Certificate Agreement and Declaration of Trust, dated March 1, 1928, for instance, on page 3, appears the statement as to what property right the owner of the certificate has. This begins as follows:

> "This Certifies that ..... is registered on the books of the Trustee hereinafter named as the owner of ..... three thousand two hundred and fiftieths (...../3250ths) of the equitable ownership and beneficial interest in certain property located at the northeast corner of Clark and Randolph Streets, Chicago, Illinois, fronting approximately one hundred and eighty feet on the easterly side of Clark Street, and approximately one hundred and sixty feet on the northerly side of Randolph Street, the title to which is held by Chicago Title and Trust Company, as Trustee for the benefit of the holder or holders of this Certificate and of similar Certificates issued or to be issued by the trustee to evidence ownership of said beneficial interest in said property so held by it in trust."

The declaration of trust begins with a recital of the real estate held in trust (top of p. 2) as follows:

> "Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original Town of Chicago."

The claim of counsel for plaintiffs in error was not that if this were an equitable interest in real estate it was nevertheless taxable and the case thus controlled by the *Rowe* case, (see brief on behalf of plaintiffs in error [p. 9]), but that the rights of the owner of the land trust certificate had gone so far beyond the ordinary equitable

interest that there was no equitable interest at all in real estate, but merely a chose in action, such as the owner of a bond might have. (See brief on behalf of plaintiffs in error, p. 14.) This Court made no finding on that argument, but treated the right of the plaintiff as an equitable interest, which it is, and then said that equitable interests were taxable, whether in choses in action, chattels or real estate. It approached the question from the point of view of the real estate outside of the state and then came to a consideration of the real estate inside of the state, whereas it is respectfully submitted, the Court should have first considered the question of uniformity of taxation under the Ohio Constitution.

As to the nature of the Lincoln Inn Court Building Land Trust, a careful reading of this trust agreement will show that the owner has not an equitable, but a *legal interest*. The certificate reads:

> "Now, Therefore, this certificate witnesseth that said ..... is the owner of an undivided ..... /1275ths interest in the premises described in said lease, and as such owner is entitled to receive ..... proportionate share of the rents reserved and paid under said lease after the deduction therefrom annually of the sum of $100; and that at any time on demand The Title Guarantee & Trust Company will deliver special warranty deeds for undivided interests in said premises, subject to the perpetual lease aforesaid on the surrender of this and other certificates, . . ."

We have already referred to the statement of Mr. Justice Holmes in *Anderson* v. *Durr*, 257 U. S. 110, that an owner cannot be taxed for land situated elsewhere and

that it does not matter whether the interest is legal or equitable. In *37 Cyc. 754*, it is stated:

> "Trust property cannot be taxed both to the trustee and to the cestui que trust."

citing *Rohnson* v. *Dover*, 59 N. H. 521; *Berry* v. *Windham*, 59 N. H. 288; *Commissioners* v. *Fall Brook Coal Co.*, 156 Pa. 488. See, also, *61 C. J. 143*, to same effect. The same statement is made in *Cooley on Taxation*, 4th Ed., 591, at Sec. 241.

Perry on Trusts, 7th Ed., paragraph 7, page 7, says that "interests in land" were of three kinds: 1, the fee; 2, the use; and 3, the equitable interest.

See the quotations from decisions of the Supreme Court of Ohio in *Lessees of Avery* v. *Dufrees*, 9 Ohio 145, at 147, and *Biggs* v. *Bickel*, 12 O. S. 49, paragraph 3 of the syllabus, both holding that equitable interests are real estate. (Brief on behalf of defendant in error, pp. 7 and 8.)

In *Zumstein, Treasurer*, v. *Coal & Mining Co.*, 54 O. S. 264, at 271, the Court said:

> "The term 'lands' when not restricted in meaning by related provisions, includes all interests therein."

Funk & Wagnall's standard dictionary gives one of the definitions of "land" as:

> "A share or interest in lands, tenements or hereditaments."

(B) Though interests in land may be taxed separately, under the uniform rule all the interests together may only pay the taxes that the holder of the whole interest would pay, if there were no other interests in the land.

In *Zumstein, Treasurer,* v. *Coal & Mining Co.,* 54 O. S. 264 (1896), the syllabus reads:

> "Lands owned by a municipal corporation and leased for more than fourteen years, not subject to revaluation, are under the provisions of section 2733, Revised Statutes, taxable only to the extent of the lessee's interest therein."

The reverse of this situation illustrating the same principle, was decided in *Cincinnati College* v. *Yeatman,* 30 O. S. 276 (1876), where it was held that when the second floor of the Cincinnati College Building was leased to the Young Men's Mercantile Library Association, which was an exempt corporation, the Auditor was bound to transfer the value of the part of the building leased out of the name of the plaintiff and into the name of the Young Men's Mercantile Library Association, which might thereby procure an exemption of part of the building.

(C) On the question of unreasonable discrimination this Court in the last page of its opinion says:

> "Even if the statute were applicable, there is an obvious difference between an interest consisting of an entity and one divided into many shares, evidenced by transferable certificates."

It is not a question of the difference between entities and joint interests. It is a question between real inter-

ests as against equitable interests, and equitable interests divided into shares evidenced by transferable certificates as against equitable interests divided into shares not evidenced by transferable certificates. As we interpret the decision of this Court in this case, any equitable interest in real estate, no matter how created or how evidenced, is taxable. So, if a father left his real estate to a trustee in trust to pay the income to children until they reached a certain age or during life, they have an equitable interest, which this Court says would be taxable just as the equitable interest of Mrs. Rowe in the *Rowe* case. If members of a family have conveyed real estate to a trustee, for convenience in handling, and the trustee executes a declaration of trust, though no certificates evidencing their interest have been issued, the beneficiaries of that trust, too, must pay taxes under the ruling of this Court that such interests are choses in action rather than equitable interests in land.

So far the taxing authorities have not sought to levy taxes on such interests. They have thought that the statute meant that such interests were exempt from taxation, but that only equitable interests in land evidenced by transferable certificates would be taxable. Ordinarily, it is legal rights and privileges, which constitute property, that are taxed, and the Supreme Court of Ohio and the Supreme Court of the United States have said that you cannot tax the evidence of the property, but only the property itself. *Cassidy* v. *Ellerhorst*, 110 O. S. 535, see especially page 545; *Ball & American Exchange Bank* v. *Towle*, 67 O. S. 306, 314; *Selliger* v. *Commonwealth of Kentucky*, 213 U. S. 200.

A transferable certificate is like a deed. There is nothing magic in it. The equitable interest which it represents must be conveyed with the same formalities as a deed or other instrument conveying an interest in land, including acknowledgment before a Notary Public and two witnesses. It descends like real estate; at least, that has been the ruling of the Probate Courts up to this date. What is the difference, if it is a unit or is divided into shares? If the equitable interest were a unit, would the court say that it were taxable because it was evidenced by an instrument that had a form of acknowledgment already prepared on the back though it would not be taxable if the owner of the equitable interest did not have this kind of an instrument in his possession? If ten members of a family get together and put their property in the hands of a trustee, for convenience in management, are their interests now to be taxable in addition to the taxes that the trustee pays on the fee?

All these questions arise because of the decision of this Court, and they are very important. Property rights, already acquired, on the basis of the opinions of the Attorney General and of opinions of attorneys in private practice following those opinions and the decision of other courts of last resort, there having been none heretofore to the contrary, will be upset by this decision.

There has not been time since the decision rendered by the Court, to make an exhaustive search of all of the authorities on the questions presented. It has been thought sufficient for the purpose of this application to sketch the points involved and leave the more detailed

presentation for the rehearing. In view of the importance of the questions involved, the possible finality of this Court's decision even though a majority of the Supreme Court should disagree, the effect that this would have on the residents of the First Judicial District as against residents of other judicial districts, the novelty of the questions presented and the fact that the Court made its decision on a basis that was not stressed either in the briefs or arguments, we urge the Court to grant a rehearing.

Respectfully submitted,

PAXTON & SEASONGOOD,
Attorneys for Defendant in Error.

ENTRY.

(Entered Feb. 5, 1934. Minute 28.)

The application of the defendant in error for a rehearing of this cause is denied.

Enter, February 5, 1934.

FRANCIS M. HAMILTON,
Presiding Judge.

JUDGMENT ENTRY.

(Entered Feb. 28, 1934. Minute 57.)

This cause came on for hearing upon the petition in error, the transcript, the bill of exceptions, and the orig-

inal papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel; and, on consideration thereof, the Court find that there is error apparent upon the record in the proceedings of said Court to the prejudice of the plaintiffs in error in this, to-wit:

That the Court of Common Pleas erred in holding that Section 5323 of the General Code of Ohio insofar as it purports to tax equitable interests in lands and rents derived therefrom when such interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the constitutions of the State of Ohio and of the United States of America and amendments thereto.

It is therefore considered and ordered by the Court that the judgment heretofore rendered in this cause by said Court of Common Pleas be, and the same hereby is, reversed and that the petition of this defendant in error in the court below be, and the same hereby is, dismissed at the costs of the defendant in error.

To all of which the defendant in error, by his counsel, excepts.

And it appearing to the Court from the statements of counsel for the defendant in error that it is their desire and intention to file appropriate proceedings for review of the action of this Court in the Supreme Court of Ohio, it is ordered that the special mandate to be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution of this judgment be withheld and the injunction heretofore granted in this case by the Court of Common Pleas of Hamilton County, Ohio, may be, and the same

hereby is, continued in full force and effect, pending the final determination on review by the Supreme Court of Ohio.

Enter, February 28, 1934.

FRANCIS M. HAMILTON,
Presiding Judge.

PAXTON & SEASONGOOD,
Attorneys for Defendant in Error.
THOMAS C. LAVERY,
Attorney for the Tax Commission of Ohio.
WALTER M. LOCKE,
Assistant Prosecuting Attorney.

ENTRY SUBSTITUTING PARTY PLAINTIFF IN ERROR.

(Entered Mar. 13, 1934. Minute 73.)

(See pages 11 and 12, where said entry is printed in full.)

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

No. A-31247

MAX SENIOR,

Plaintiff,

vs.

GEORGE C. BRADEN, QUINCY A. DAVIS, JOHN S. EDWARDS and ANTHONY J. KRAUS constituting the Tax Commission of Ohio, ROBERT HEUCK, as Auditor of Hamilton County, Ohio, and EDGAR FRIEDLANDER, as Treasurer of Hamilton County, Ohio,

Defendants.

January Term, 1932.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

Mar. 14, 1932. Petition and precipe filed and summons issued.

Mar. 15, 1932. Motion for temporary restraining order filed.

Mar. 21, 1932. Summons returned endorsed; State of Ohio, Franklin County, ss: March 18, 1932.

Received this writ March 15, 1932, 9:00 o'clock A. M. and pursuant to its command on March 16, 1932, I served the within named George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus by personally handing to each of them a true and certified copy of this writ with all endorsements thereon.

HARRY T. PAUL,
Sheriff Franklin County, Ohio.

Sheriff Fees: $1.96. By A. C. DICKERSON, *Deputy.*

Mar. 24, 1932. Min. 2724. Leave given defendants, Robert Heuck and Edgar Friedlander, to file answer.

Mar. 24, 1932. Answer filed.

Mar. 24, 1932. Min. 2726. Application for Official Stenographer filed and allowed.

Paxton and Seasongood, attorneys for plaintiff and J. B. Joselson, attorney for defendant, request the services of an Official Stenographer to make a full report of the testimony and proceedings in this case.

(Signed) PAXTON & SEASONGOOD,
J. B. JOSELSON.

The above request for an Official Stenographer is granted and Mrs. Nellie B. Arthur is appointed to make a full report of the testimony and proceedings.

Mar. 24, 1932. Min. 2745. Cause heard and submitted to the Court.

This cause coming on for hearing upon the pleadings and the evidence, a jury by consent of both parties having been waived, and the testimony having been heard, cause was submitted to the Court on the evidence without the intervention of a Jury.

Mar. 28, 1932. Summons returned endorsed. Received by Asa V. Butterfield, Sheriff, Hamilton County, Ohio, March 14th, 2:33 P. M., 1932. Cincinnati, March 15, 1932. Served the within defendants, Robert Heuck and Edgar Friedlander, by delivering to each personally, a true copy of this writ with all endorsements thereon.

ASA V. BUTTERFIELD,
Sheriff, Hamilton County, Ohio.
Sheriff fees: $1.32. By JOHN J. WEHRMAN, *Deputy.*

Mar. 30, 1932. Min. 2895. Entry granting motion for a temporary restraining order. Bond, $500.00.

This cause came on to be heard upon the motion of plaintiff herein for a temporary restraining order, as prayed for in the petition heretofore filed in this cause, and upon the evidence and arguments of Counsel, upon consideration whereof the Court finds the said motion to be well taken and does grant the same.

It is therefore, ordered, adjudged and decreed that the defendant herein be, and each of them hereby is, temporarily restrained, until the further order of this Court, from in any manner assessing or collecting or attempting to assess or collect from plaintiff the Ohio Intangible Property Tax upon plaintiff's equitable interests in land, more particularly set forth in the petition heretofore filed in this cause, and from taking any steps whatever against plaintiff for the non-payment thereof, upon the giving of bond by plaintiff, with security to the approval of the clerk of this Court, in the sum of Five Hundred Dollars ($500.00).

To all of which defendants excepts.

It is further ordered that the Treasurer of Hamilton County, Ohio, be and he hereby is authorized to accept payment of the amount of taxes tendered to him by plaintiff at the time of the filing of plaintiff's return.

Mar. 30, 1932. Bond No. 6 Bond Book No. 27 in $500.00 given.

Sept. 9, 1932. Min. 2276. Leave given to file Answer of Tax Commission.

Jan. 28, 1933. Min. 1174. Entry perpetually enjoining defendants from assessing any Ohio intangible tax against plaintiff at defendants' costs. Notice of appeal given, no bond.

This cause came on to be heard on the pleadings and evidence, was argued by Counsel and considered by the Court. Whereupon the Court finds that the allegations set forth in the petition are true, and on the issues joined in favor of the plaintiff; that section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land, and rents derived therefrom, when such equitable interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereof; and that the relief prayed for in plaintiff's petition should be granted.

It is therefore, ordered, adjudged and decreed that the defendants herein, and their successors in office, be, and they hereby are, perpetually enjoined from in any manner assessing or collecting or attempting to assess or collect from plaintiff any Ohio intangible property tax on plaintiff's legal or equitable interests in land represented by transferable certificates, known as land trust

certificates, and from taking any steps whatever against plaintiff for the non-payment thereof.

It is further ordered that plaintiff recover of the defendants his costs herein expended in the amount of ..... dollars and execution may issue therefor.

The temporary restraining order granted herein having been made final, it is ordered that plaintiff and his surety, Hartford Accident & Indemnity Company, of Hartford, Conn., be discharged from any liability on the Bond given in connection with the temporary restraining order.

To all of which judgment, finding and order of the Court the defendants except and give notice of the appeal of this case; and said defendant and each of them having given official bonds with sureties, as required by law, in their respective official capacities, no appeal bond is herein required or fixed.

Jan. 30, 1933. Motion of defendants for new trial filed.

Jan. 30, 1933. Min. 1201. Entry overruling motion for a new trial.

This cause coming on this day to be heard upon the defendants for a new trial herein; and the Court being fully advised in the premises, on consideration thereof finds that said motion should be overruled.

It is therefore ordered, adjudged and decreed that said motion be, and the same is hereby overruled.

To the overruling of which motion for a new trial the defendants herein excepts.

Jan. 30, 1933. Notice of appeal of defendants filed.

Mar. 3, 1933. Bill of Exceptions filed.

Mar. 3, 1933. Waiver of notice of filing of bill of exceptions and consent to immediate transmission of same.

Mar. 3, 1933. Bill of Exceptions transmitted to Judge Dennis Ryan.

Mar. 3, 1933. Bill of Exceptions received from Judge Dennis J. Ryan, signed and allowed.

STATE OF OHIO,
COUNTY OF HAMILTON. } ss:

I, Peter J. McCarthy, Clerk of the Court of Common Pleas, within and for the County and State aforesaid, do hereby certify the within and foregoing to be a true and correct Transcript of the Docket and Journal Entries in the Case No. A-31247, wherein Max Senior was the plaintiff and George C. Braden, Quincy A. Davis, etc., the defendants as appears from the files and records now in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the Seal of said Court, at Cincinnati, this 6th day of March, A. D. 1933.

PETER J. MCCARTHY,
Clerk of the Common Pleas Court
of Hamilton County, Ohio.
[SEAL] By J. C. SPILLE, *Deputy.*

PETITION.

(Filed March 14, 1932.)

Plaintiff, Max Senior, was on January 1, 1932, and now is, a resident of the City of Cincinnati, County of Hamilton and State of Ohio.

The defendants, George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, constitute the Tax Commission of Ohio, the defendant, Robert Heuck, is the duly elected, qualified and acting Auditor of Hamilton County, Ohio, and the defendant, Edgar Friedlander, is the duly elected, qualified and acting Treasurer of said county.

Plaintiff was on January 1, 1932, and now is, the owner of certain equitable interests in land evidenced by transferable certificates of ownership, viz:

DESCRIPTION	TRUSTEE	AGGREGATE DENOMINATION OR NO. OF FRACTIONAL INTEREST	RATE	INCOME YIELD
Lincoln Inn Court Ground Rent, Cincinnati, Ohio.	Title Guar. & Trust Co., Cincinnati, O.	340/1275	$4.25	$1445.04
Clark Randolph Building site Chicago, Illinois	Chicago Title & Trust Co., Chicago, Ill.	5/3250	52.50	262.50
Woman's City Club, Cincinnati, Ohio.	Title Guar. & Trust Co., Cincinnati, O.	5/1000	2.00	10.00
Rockefeller Bldg., Cleveland, Ohio.	Cleveland Trust Co., Cleveland, Ohio.	2/1400	60.00	120.00
Insurance Exchange Bldg., Boston, Mass.	1st National Bank, Boston, Mass.	1/1900	55.00	13.75
City National Bank Bldg., Omaha, Neb.	Union Trust Co., Cleveland, Ohio.	5/1000	55.00	275.00
Fidelity Mortgage Co., Cleveland, Ohio.	Midland Bank, Cleveland, Ohio.	7/1050	60.00	105.00

The rental paid to plaintiff, as equitable owner as aforesaid, during the year 1931 was Two Thousand Two Hundred Thirty-one Dollars and Twenty-nine ($2231.29) Cents.

Plaintiff has duly filed with the defendant, Robert Heuck, as County Auditor as aforesaid, his individual return of taxable property for 1932 on the official forms prescribed by the Tax Commission of Ohio and has duly paid to the defendant, Edgar Friedlander, as County Treasurer as aforesaid, one-half (½) of the tax lawfully due in accordance with said return. Plaintiff has fully and in good faith listed in said return the taxable property required by law to be so listed, including the rental received from his said equitable interests in land, as above set forth, but has not included the amount of such rental as "income yield" subject to tax.

Plaintiff says that General Code of Ohio, Section 5323, purports to except from taxation as investments "interests in land and rent and royalties derived therefrom other than equitable interests divided into shares evidenced by transferable certificates," that is, said section purports to except from taxation as investments interests in land, legal and equitable, and rents derived therefrom when not evidenced by transferable certificates, but does not except from taxation as investments equitable interests in land and rents derived therefrom when evidenced by transferable certificates.

Plaintiff says that the assessing and collecting of taxes on plaintiff's said equitable interests in land evidenced by transferable certificates, when all other equitable interests in land not so evidenced are exempted therefrom, is an arbitrary and unreasonable discrimination without warrant of law, and amounts to a taking of private property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the

law, in violation of plaintiff's rights under the Constitution of the United States and of Article XIV, Section 1 of the amendments thereto.

Plaintiff further says that the lands in which plaintiff has such equitable ownership, as aforesaid, have been assessed in the names of the legal owners or lessees thereof according to value, without any deduction or diminution by reason of plaintiff's interests in said lands. Plaintiff says that the levying and collecting of taxes on his equitable interests in the lands so assessed at full value in the names of the owners or lessees constitutes double and unequal taxation in violation of the Constitution of Ohio and Article XII, Sections 2 and 5 thereof. Plaintiff further says that equitable interests in land whether evidenced by transferable certificates or not, constitute interests in real estate within the purview of Section 5322 of the General Code of Ohio, defining real property and land; and that Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land other than by uniform rule is contrary to Article XII, Section 2 of the Constitution of Ohio which provides that "land and improvements thereon shall be taxed by uniform rule according to value."

Plaintiff further says that the levying and collecting of taxes on plaintiff's equitable interests in real estate situated outside the State of Ohio, to-wit, the Clark Randolph Building Site in Chicago, Illinois, the Insurance Exchange Building in Boston, Massachusetts, and the City National Bank Building in Omaha, Nebraska, is an attempt to levy and collect taxes on property wholly outside the State of Ohio, is beyond the taxing power of the

State of Ohio and amounts to a taking of private property without due process of law in violation of the Constitution of the State of Ohio and Article I, Section 16 thereof, and of the Constitution of the United States and Article XIV, Section 1 of the Amendments thereof.

Defendants intend to assess, threaten to assess and will, unless restrained by order of this court, assess the Ohio intangible property tax on plaintiff's said equitable interests in land, and will attempt to collect said tax, to the irreparable injury of plaintiff, as to which plaintiff is without adequate remedy at law.

WHEREFORE, plaintiff prays that the court declare that General Code of Ohio, Section 5323, insofar as it purports to tax equitable interests in land, and rents derived therefrom, only when such equitable interests are evidenced by transferable certificates, to be illegal, unconstitutional and void; that a temporary order issue restraining the defendants and each of them from in any manner assessing or collecting or attempting to assess or collect from plaintiff the Ohio intangible property tax on plaintiff's said equitable interests in land and from taking any steps whatever against plaintiff for the nonpayment thereof; that upon final hearing said injunction may be made perpetual; and for plaintiff's costs herein expended and for all other and further relief to which plaintiff may be entitled, either in law or in equity.

PAXTON & SEASONGOOD,
Attorneys for Plaintiff.

STATE OF OHIO,
COUNTY OF HAMILTON. } ss:

Max Senior, being first duly sworn, deposes and says that he is the plaintiff herein and that the facts stated in the foregoing petition are true.

MAX SENIOR.

[Duly verified.]

[SEAL]

PRAECIPE.

TO THE CLERK:

Issue summons directed to the Sheriff of Hamilton County, Ohio, to serve the defendants, Robert Heuck and Edgar Friedlander, returnable according to law and endorse: "Action for injunction, temporary restraining order and other relief."

Issue summons directed to the Sheriff of Franklin County, Ohio, to serve the defendants, George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, returnable according to law and endorse: "Action for injunction, temporary restraining order and other relief."

PAXTON & SEASONGOOD,
Attorneys for Plaintiff.

Let a temporary restraining order issue as prayed for herein upon plaintiff giving bond as required by law in the sum of .....

_____,
Judge, Court of Common Pleas,
Hamilton County, Ohio.

MOTION FOR TEMPORARY RESTRAINING ORDER.

(Filed March 15, 1932.)

Now comes the plaintiff and moves the court for a temporary restraining order herein.

PAXTON & SEASONGOOD,
Attorneys for Plaintiff.

ANSWER.

(Filed March 24, 1932. Minute 2724.)

Now come the defendants Robert Heuck and Edgar Friedlander and for answer to the petition admit that they are respectively the duly elected, qualified and acting Auditor and Treasurer of Hamilton County, Ohio; that plaintiff, Max Senior, was on January 1, 1932, and now is a resident of the City of Cincinnati, Hamilton County, Ohio, and that on said date was the owner of certain land trust certificates set out in the petition and that as owner of such certificates he received during the year 1931 an income of $2231.29.

These defendants admit that unless otherwise restrained they will assess and proceed to collect the taxes on said land trust certificates in accordance with the tax laws of the State of Ohio.

For further answer these defendants deny each and every allegation contained in the petition not herein admitted to be true.

Wherefore, having fully answered the defendants pray that the petition herein be dismissed and that the defendants recover their costs herein expended.

ROBERT N. GORMAN,
Prosecuting Attorney.
JACK B. JOSSELSON,
Ass't Prosecuting Attorney.

STATE OF OHIO,
COUNTY OF HAMILTON. } ss:

Now comes Robert Heuck, the duly elected, qualified and acting Auditor of Hamilton County, Ohio, and says that he is one of the defendants in the foregoing answer and that the facts therein are true as he verily believes.

ROBERT HEUCK.

[Duly verified.]
[SEAL]

ENTRY GRANTING TEMPORARY RESTRAINING ORDER.

(Entered Mar. 30, 1932. Minute 2895.)

This cause came on to be heard upon the motion of plaintiff herein for a temporary restraining order, as prayed for in the petition heretofore filed in this cause, and upon the evidence and arguments of counsel, upon consideration whereof the court finds the said motion to be well taken and does grant the same.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the defendants herein be, and each of them hereby is, temporarily restrained, until the further order of this court, from in any manner assessing or collecting or attempting to assess or collect from plaintiff the Ohio Intangible Property Tax upon plaintiff's equitable interests in land, more particularly set forth in the petition heretofore filed in this cause, and from taking any steps whatever against plaintiff for the non-payment thereof, upon the giving of bond by plaintiff, with security to the approval of the clerk of this court, in the sum of Five Hundred ($500.00) Dollars.

To all of which defendants except.

It is further ordered that the Treasurer of Hamilton County, Ohio, be and he hereby is authorized to accept payment of the amount of taxes tendered to him by plaintiff at the time of the filing of plaintiff's return.

O. K.—

PAXTON & SEASONGOOD,
Attorneys for Plaintiff.

ANSWER OF THE DEFENDANTS, GEORGE C. BRADEN, QUINCY A. DAVIS, JOHN S. EDWARDS AND ANTHONY J. KRAUS.

(Filed September 27, 1932. Minute 2276.)

Now come the defendants, George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, and by way of answer to plaintiff's petition filed herein, admit that these defendants are the members of the Tax Commission of Ohio; further admit that the defendant, Robert Heuck, is the duly elected, qualified and acting Auditor of Hamilton County, Ohio, and that the defendant, Edgar Friedlander, is the duly elected, qualified and acting Treasurer of Hamilton County; further answering, these defendants deny each and every allegation in plaintiff's petition contained, not herein specifically admitted to be true.

Further answering, and by way of affirmative defense, these defendants deny that the allegations contained in plaintiff's petition are sufficient to give the court any jurisdiction as to the relief prayed for in plaintiff's petition.

WHEREFORE, these defendants having fully answered, pray that the petition of the plaintiff may be dismissed at his costs.

GILBERT BETTMAN,
Attorney General.
PERRY L. GRAHAM,
Assistant Attorney General.

FINAL DECREE.

(Entered Jan. 28, 1933. Minute 1174.)

This cause came on to be heard on the pleadings and evidence, was argued by counsel and considered by the court. Whereupon the court finds that the allegations set forth in the petition are true, and on the issues joined in favor of the plaintiff; that Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land, and rents derived therefrom, when such equitable interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereof; and that the relief prayed for in plaintiff's petition should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendants herein, and their successors in office, be, and they hereby are, perpetually enjoined from in any manner assessing or collecting or attempting to assess or collect from plaintiff any Ohio intangible property tax on plaintiff's legal or equitable interests in land represented by transferable certificates, known as land trust

certificates, and from taking any steps whatever against plaintiff for the non-payment thereof.

It Is Further Ordered that plaintiff recover of the defendants his costs herein expended in the amount of ..... Dollars ($.....) and execution may issue therefor.

The temporary restraining order granted herein having been made final, it is ordered that plaintiff and his surety, Hartford Accident & Indemnity Company, of Hartford, Connecticut, be discharged from any liability on the bond given in connection with the temporary restraining order.

To all of which judgment, finding and order of the Court the defendants except and give notice of the appeal of this case; and said defendants and each of them having given official bonds with sureties, as required by law, in their respective official capacities, no appeal bond is herein required or fixed.

O. K.—

Paxton & Seasongood,
Attorneys for Plaintiff.

Have seen—

Walter M. Locke,
Ass't Prosecuting Attorney.

O. K.—

John W. Bricker,
Attorney General, and
Wm. J. Ford,
Ass't Attorney General.
Thos C. Lavery,
For the Tax Commission of Ohio.

MOTION FOR A NEW TRIAL.

(Filed January 30, 1933.)

Now come all of the Defendants above named, by the Prosecuting Attorney of Hamilton County, Ohio, and move the Court to set aside the verdict heretofore rendered by the jury herein, and for a new trial for the following reasons:

1. The decision of the Court is not sustained by the evidence.
2. The decision of the Court is contrary to the evidence.
3. The judgment of the Court should have been for the defendants and against the plaintiff.
4. For other errors of law occurring at the trial and excepted to by the parties making the application.

Respectfully submitted,

LOUIS J. SCHNEIDER,
Prosecuting Attorney.

By WALTER M. LOCKE,
Ass't Prosecuting Attorney.
Attorneys for Defendants.

THE TAX COMMISSION OF OHIO,
By THOMAS C. LAVERY,
Of Counsel.

ENTRY OVERRULING MOTION FOR A NEW TRIAL.

(Entered January 30, 1933. Minute 1201.)

This cause coming on this day to be heard upon the Motion of the Defendants for a new trial herein; and the

Court being fully advised in the premises, on consideration thereof finds that said Motion should be overruled.

It is therefore Ordered, Adjudged and Decreed that said Motion be, and the same is hereby overruled.

To the overruling of which Motion for a New Trial the Defendants herein except.

Enter.

RYAN,
Judge.

NOTICE OF APPEAL.

(Filed January 30, 1933.)

Now come George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus, constituting the Tax Commission of Ohio, Robert Heuck, as Auditor of Hamilton County, Ohio, and Edgar Friedlander, as Treasurer of Hamilton County, Ohio, who in their respective official capacities are parties defendant in the above entitled action and jointly and severally make, give and file this their written notice of appeal in the above entitled case, for the purpose and hereby to effect on behalf of said defendants and each of the same an appeal of this case to the Court of Appeals of Hamilton County, Ohio, said defendants and each of them having in their official capacities given official bond with sureties as required by law.

EDGAR FRIEDLANDER,
Treasurer of Hamilton County, Ohio.

ROBERT HEUCK,
Auditor of Hamilton County, Ohio.

By LOUIS J. SCHNEIDER,
Prosecuting Attorney.
By WALTER M. LOCKE,
Ass't Prosecuting Attorney.
Their Attorneys.

GEORGE C. BRADEN,
QUINCY A. DAVIS,
JOHN S. EDWARDS, and
ANTHONY J. KRAUS,
By JOHN W. BRICKER,
Attorney General.
WM. J. FORD,
Ass't Attorney General.
Their Attorneys.

BILL OF EXCEPTIONS.

(Filed April 6, 1933.)

APPEARANCES:—

Messrs. Paxton & Seasongood and Robert P. Goldman, on behalf of Plaintiff.

Messrs. Leonard Freiberg and Jack Josselson, Assistant Prosecutors of Hamilton County, on behalf of Defendants.

BE IT REMEMBERED, that upon the trial of this cause at the January, 1932, Term of the Court of Common Pleas, before the Honorable Dennis J. Ryan, the following was introduced:—

MARCH 24, 1932.

MR. GRAHAM: If your Honor please, on behalf of the Tax Commission I want to move for a dismissal of the

Tax Commission because the petition does not state a cause of action against the Tax Commission, and we contend that the Court has no jurisdiction to hear this injunction.

THE COURT: (After discussion of Counsel on Motion.) The motion to dismiss for want of jurisdiction will be overruled. Exception noted.

And thereupon the Plaintiff to maintain the issues upon his part, offered the following evidence, to-wit:—

MAX SENIOR, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GOLDMAN:

Q. Your name is Max Senior?

A. Yes, sir.

Q. You are a resident of Cincinnati, Hamilton County, Ohio?

A. Yes, sir.

Q. And you have made your tax return?

A. Yes.

Q. And returned all of your taxable personal property on your return, including land trust certificates?

A. Yes.

Q. And you have paid the tax required on all except the land trust certificates?

A. Yes, sir.

Q. You were the owner on January 1, 1932, and are now the owner of the property represented by the land trust certificates that are listed in this case?

A. Yes, sir.

MR. GOLDMAN: We have here the original of the land trust certificates, but naturally do not want to leave them here, and we will introduce in evidence these photostatic copies.

THE COURT: You may substitute the photostatic copies for the originals.

MR. GOLDMAN: We will offer these in evidence:

Exhibit No. 1, Ground rent on Lincoln Inn Court Building certificate;

Exhibit No. 2, Clark-Randolph Building Site certificate;

Exhibit No. 3, Woman's City Club of Cincinnati, Land Trust Certificate;

Exhibit No. 4, Rockefeller Building, Cleveland, Ohio, Certificate;

Exhibit No. 5, Insurance Exchange Building, Boston, certificate;

Exhibit No. 6, City National Bank Building, Omaha, Nebraska, Certificate;

Exhibit No. 7, Fidelity Mortgage, 6/1050 shares;

Exhibit No. 8, Fidelity Mortgage for 1/1050 shares;

Exhibit No. 9, Copy of the Declaration of Trust of the Title Guaranty & Trust Company of Cincinnati certificate, in connection with the Lincoln Inn Court Building;

Exhibit No. 10, is an agreement of declaration of trust between the Chicago Title & Trust Company as Trustee, and the holders of land trust certificates and equitable ownership in the Clark-Randolph Building Site;

Exhibit No. 11, is the indenture of lease from William G. Pohl to William Sage of the same property;

Exhibit No. 12, is the trust agreement and declaration of trust of the Title Guaranty & Trust Company to the Woman's City Club of Cincinnati property;

Exhibit No. 13, is a photostatic copy of the agreement of declaration of trust between the Cleveland Trust Company, Trustee, and the holders of land trust certificates in property located in Cleveland, including the Rockefeller lease;

Exhibit No. 14, is a photostatic copy of a lease covering the same property;

Exhibit No. 15, is the agreement and declaration of trust between the First National Bank of Boston, Trustee, and the holders of certificates representing ownership in the premises occupied by the Insurance Exchange in Boston;

Exhibit No. 16, is the indenture of lease covering the same property;

Exhibit No. 17, is the agreement and declaration of trust between the Union Trust Company of Cleveland, Ohio, as Trustee, and the holders of land trust certificates in the property located in Omaha, Nebraska, and leased to the City National Bank Building Company;

Exhibit No. 18, is an indenture of lease covering the same property;

Exhibit No. 19, is an agreement and declaration of trust between the Midland Bank, as Trustee, and holders of land trust certificates of equitable ownership in the property located in Cleveland, Ohio, and leased to the Fidelity Mortgage Company, and dated July 1, 1925;

Exhibit No. 20, is an indenture of lease covering the same property.

THE COURT: They may all be received in evidence.

Said Exhibits Nos. 1 to 20 inclusive, so marked, attached hereto and made a part hereof.

STIPULATION.

DICTATED BY MR. GOLDMAN:

It is stipulated by and between Counsel for Plaintiff and Defendants, that the customary real estate taxes have been levied and assessed against the respective properties which are subjects of the trust agreements and certificates involved herein.

It is further stipulated that Counsel for Defendants admit that the lands in which plaintiff claims an equitable interest, as stated in the petition, have been assessed in the names of the legal owners or lessees thereof according to law without any deduction or diminution by reason of Plaintiff's claimed interest in said lands.

MR. GOLDMAN: We offer in evidence the advance payment of tax receipt, as Exhibit No. 21.

THE COURT: Received.

Said exhibit marked Exhibit No. 21, attached hereto and made a part hereof.

MR. GOLDMAN: We haven't here a copy of the lease of the Lincoln Inn Court Building, but it will be offered later as Exhibit No. 22.

THE COURT: It will be received.

NO CROSS EXAMINATION.

Witness excused.

MR. GOLDMAN: The plaintiff rests, your Honor.

MR. FREIBERG: If your Honor please, on behalf of Mr. Graham and the County officials, we desire to renew the motion for dismissal of the petition.

Argument of Counsel on Motion.

THE COURT: The motion will be overruled.

MR. GRAHAM: We reserve an exception.

MR. FREIBERG: We reserve an exception.

(A short recess was had at this time.)

DEFENSE.

And thereupon the defendants to maintain the issues on their part, offered the following evidence, to-wit:

MR. J. J. ROWE, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FREIBERG:

Q. What is your name, please?

A. J. J. Rowe.

Q. And your residence?

A. Columbia Township, Hamilton County.

Q. You are President of the First National Bank of Cincinnati?

A. Yes, sir.

Q. And naturally are familiar with its business?

A. Yes, sir.

Q. Does your Bank have occasion to deal with Land Trust Certificates in any connection?

A. They are sometimes offered as collateral, and accepted as collateral.

Q. Will you tell the Court whether or not your Bank in receiving Land Trust Certificates as collateral, regards

them in any substantial different light than stocks and bonds offered as collateral?

MR. GOLDMAN: I object.

THE COURT: Sustained. Exception noted.

Q. Mr. Rowe, when receiving these as collateral, what steps do you take?

MR. GOLDMAN: I object, your Honor, that is immaterial.

THE COURT: The objection will be sustained.

Q. Mr. Rowe, for what purposes does your Bank use Land Trust Certificates, that is collateral for what items?

MR. GOLDMAN: I object.

THE COURT: Overruled, he may answer.

A. The only purpose for which we can legally receive them, as far as I know, is for collateral on notes from a borrower. We are forbidden to own them as a Bank because they are believed to be real estate by the Treasurer. As collateral they are accepted for what they state on their face as being a fraction of participation in real estate, with the added attraction of having a substantial ready market.

Q. And negotiable?

A. Yes, negotiable.

Q. And it is,——

MR. GOLDMAN: I object, and ask that go out.

THE COURT: The objection is sustained as to the negotiability, the balance may remain in.

Q. Does your Bank examine the title of the property, Mr. Rowe, before receiving these certificates as collateral?

MR. GOLDMAN: I object.

THE COURT: Overruled.

A. We look into the circular issued and see what it says as to the examination of title and-so-forth, as to the amount of issue in proportion to the appraised value of the property.

Q. You do that also, do you not, with bonds that you receive as collateral?

MR. GOLDMAN: I object.

THE COURT: Sustained. Exception noted.

MR. FREIBERG: I wish to make a proffer of the answer.

PROFFER: The witness would testify, if permitted to answer, that the same procedure is followed in the case of bonds that are received as collateral.

MR. GOLDMAN: If your Honor please, Counsel has made a proffer here, and I don't know whether he got that from the witness or not, and I would like to know if the proffer that Counsel made is what the witness would testify to.

THE COURT: I don't think Counsel must tell you that. Counsel may make any proffer he chooses.

Q. Mr. Rowe, are you familiar with the processes of other banks, both National and State, can you state whether or not they also receive Land Trust Certificates as collateral for loans?

A. I am not familiar with that.

Q. You are not familiar with the process of other banks?

A. Not to that extent, or degree, no.

Q. Do you know of any other banks that do take them?

MR. GOLDMAN: I object.

THE COURT: He may testify if he knows.

A. My impression is that they are generally accepted as collateral. The percentage offered being quite small. That is all.

NO CROSS EXAMINATION.

Witness excused.

MR. GOLDMAN: The plaintiff rests, your Honor.

MR. FREIBERG: May we renew our motion as previously made at the close of plaintiff's case.

THE COURT: The motion will be overruled.

MR. FREIBERG: The defendants rest, your Honor.

At this time the hearing of this case was adjourned until 2:00 P. M.

Argument of Counsel in afternoon.

THE COURT: The matter may be submitted, and if Counsel desire to file any additional authorities, I will ask that that be done at the earliest possible moment.

The above and foregoing testimony, together with the exhibits offered and received in evidence, was all of the evidence offered by either party at the trial of this cause.

And thereupon the Court, after consideration, entered judgment as appears of record in this cause.

And thereupon within three days came the defendants by their Counsel and filed their motion to set aside said judgment and for a new trial herein, which motion after consideration, the Court overruled, to which Counsel for defendants excepted.

Defense.

And now come the defendants by their Counsel and file this their Bill of Exceptions, the same having been heretofore and within forty days of the entering of said judgment, filed with the Clerk of this Court, and asks that the same may be settled, signed, allowed and made a part of the record and proceedings herein, which is accordingly done.

WITNESS THE HAND and seal of this Court this 3rd day of March, 1933.

DENNIS J. RYAN,
Judge of the Court of Common Pleas,
Hamilton County, Ohio.

Cincinnati, Ohio, February —, 1933.

The undersigned hereby waive the issuance and service of notice of the filing of the within Bill of Exceptions and hereby consent to its immediate transmission to the Trial Judge for his approval and signature.

PAXTON & SEASONGOOD,
Attorneys for Plaintiff.

EXHIBIT "1."

No. 91 $34,000.00

CERTIFICATE OF INTEREST IN GROUND RENT.

WHEREAS The Title Guarantee & Trust Company on the fifth day of February, 1917, acquired from The Conrad-Windisch Company by deeds recorded in Deed Books 1140, page 548; 1147, page 406, and 1148, page 358, of the records of Hamilton County, Ohio, the premises at the northwest corner of Main Street and Patterson Alley in Cincinnati, fronting seventy-six feet and three inches, more or less, on the west side of Main Street, and being the property on which the Lincoln Inn Court Building is located, and holds the same pursuant to a declaration of trust executed on said date and recorded in Deed Book 1147, page 411, of said records, to which instrument reference is made for all of its terms and conditions, and

WHEREAS on said fifth day of February, 1917, said Trust Company leased said premises to Charles F. Dickson for ninety-nine years, renewable forever, with a privilege of purchase after ten years, and at any five-year period thereafter, for the sum of $127,500, and reserved an annual rental of $5518.75, payable quarterly, on the fifth days of May, August, November and February, and in addition all taxes and assessments of every kind, which lease is recorded in Lease Book 160, page 32, of said records, and to which reference is hereby made for all of its terms and conditions, and

WHEREAS Max Senior has this day purchased and paid for an undivided interest in said premises amounting to 340/1275ths.

Now Therefore, this certificate witnesseth that said Max Senior is the owner of an undivided 340/1275ths interest in the premises described in said lease, and as such owner is entitled to receive his porportionate share of the rents reserved and paid under said lease after the deduction therefrom annually of the sum of $100; and that at any time on demand The Title Guarantee & Trust Company will deliver special warranty deeds for undivided interests in said premises, subject to the perpetual lease aforesaid on the surrender of this and other certificates, provided no deed shall be demanded for less than $10,000 par value, of certificates, until after conveyance for $120,000 par value have been made.

By the acceptance of this certificate the holder agrees to become a party to and bound by the terms and conditions of said declaration of trust hereinbefore referred to and agrees that there shall be deducted from the rental reserved in said lease the sum of $100 per year as Trustee's compensation, and the balance of said rents shall be distributed by said Trustee on the fifth days of May, August, November and February of each year to the owner of this and like certificates registered on the books of said Trust Company.

This certificate shall be transferable only on the books of said The Title Guarantee & Trust Company in person or by attorney upon the surrender of this certificate in such form as said Trust Company may require and transfers of interest in said premises shall not be made in amounts less than 1/1275ths.

IN WITNESS WHEREOF, said The Title Guarantee & Trust Company has hereunto set its name and affixed its corporate seal, this 14th day of December, 1929.

THE TITLE GUARANTEE & TRUST COMPANY,
LEO F. WESTHEIMER, *President.*
CHAS. WEIDNER, JR., *Secretary.*
[SEAL]

(REVERSE SIDE OF CERTIFICATE)

For value received_____
sell, assign and transfer unto_____the interest represented by the within certificate, and do hereby irrevocably constitute and appoint_____ attorney to transfer said certificate on the books of said The Title Guarantee & Trust Company of Cincinnati with full power of substitution in the premises.

Dated_____19___

In the Presence of:

_____

_____

EXHIBIT "2."

No. 1358 Interest 5/3250ths

LAND TRUST CERTIFICATE.

OF EQUITABLE OWNERSHIP IN
THE CLARK-RANDOLPH BUILDING SITE
LOCATED IN CHICAGO, ILLINOIS

THIS CERTIFIES that Max Senior is registered on the books of the Trustee hereinafter named as the owner of five three thousand two hundred and fiftieths (5/3250ths) of the equitable ownership and beneficial interest in cer-

tain property located at the northeast corner of Clark and Randolph Streets, Chicago, Illinois, fronting approximately one hundred and eighty feet on the easterly side of Clark Street, and approximately one hundred and sixty feet on the northerly side of Randolph Street, the title to which is held by Chicago Title and Trust Company, as Trustee for the benefit of the holder or holders of this Certificate and of similar Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust. All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust, in which said property is specifically described, dated as of March 1, 1928, between the Trustee as party of the first part, Wm. G. Pohl, and such persons, partnerships, associations and/or corporations as may become parties thereto by the acceptance of Certificates of Equitable Ownership of like tenor herewith, in the trust thereby created, which Agreement and Declaration of Trust (hereinafter sometimes referred to as the "Declaration") is of record in the office of the Recorder of Deeds of Cook County, Illinois, as Document No. 9956061, to which Declaration reference is hereby made for a statement of the rights and title of the holders of this Certificate and of all other certificates issued under the Declaration, in said property, and of the terms and conditions of said trust.

The Trustee agrees that on the first days of June and December in each year, commencing June 1, 1928, it will pay to the registered holder of this Certificate, as registered on the Trustee's transfer books as of the 25th day

of the month just preceding the month in which such distribution is to be made, said holder's pro rata share of the net proceeds which may be derived by it from the rental of the property described in the Declaration and constituting the Trust Estate, and that upon any sale of said property, either under the option to purchase hereinafter mentioned or otherwise, or a sale at the termination of the trust, it will pay to the registered holder hereof such holder's proportionate share of the net proceeds derived by it from such sale, all in the manner provided in the Declaration.

Whenever in the Declaration or in this Certificate the Trustee is obligated to pay or distribute any sum of money, it is understood that all such obligations are undertaken by it in its trust capacity only and not personally and that such payments and distributions are to be made only out of such funds as the Trustee has in its hands available therefor.

The real estate hereinbefore and in Article I of the Declaration described is leased for the term beginning March 1, 1928, and ending February 28, 2027, with privilege of one renewal for ninety-nine (99) years under a Lease, which Lease is of record in the office of the Recorder of Deeds of Cook County, Illinois, as Document Number 9956059, by which the Lessee agrees to pay annually during each of the years of the term of the Lease the sum of One Hundred and Seventy Thousand Six Hundred and Twenty-five Dollars ($170,625) in equal quarter-annual installments payable on January 15th, April 15th, July 15th, and October 15th in each year, commencing April 15, 1928.

Said Lease also makes provision for the payment by the Lessee to the Lessor into a Depreciation Fund of annual sums of varying amounts, payable in quarterly installments on January 15, April 15, July 15 and October 15 in each year, the first of said installments being payable January 15, 1930, until such payments aggregate the sum of Two Million Five Hundred Thousand Dollars ($2,500,000), and provides the terms and conditions under which said fund is constituted a Depreciation Fund.

Said Lease grants to the Lessee the option to purchase the entire leased premises at the price of Three Million Four Hundred Twelve Thousand Five Hundred Dollars ($3,412,500) if the option is exercised on or before March 1, 1929; and for that amount less Sixteen Thousand Two Hundred and Fifty Dollars ($16,250) for and during each year thereafter until the amount shall by such deductions have reached Three Million Two Hundred Sixty-six Thousand Two Hundred and Fifty Dollars ($3,266,250), and thereafter at such last named sum, in each case plus accrued rental to date of purchase, all as more fully provided in said Declaration.

The shares represented by this Certificate are subject to call purchase, at the option of the Lessee, for the Depreciation Fund, at the call purchase price of Ten Hundred Fifty Dollars ($1050) per share during the first year, less Five Dollars ($5) for each year thereafter until the price shall have reached Ten Hundred Five Dollars ($1005) per share, in each case plus accrued rental to date of call purchase at the rate of Fifty-two Dollars and Fifty Cents ($52.50) per annum for each 1/3250th share, in the manner and with the effect and

upon the terms more particularly set forth in the Declaration.

The holder of this Certificate, by the acceptance hereof, expressly assents to all the terms and conditions of the Declaration and becomes a party thereto as fully to all intents and purposes as if said holder had signed the Declaration.

Subject to the terms and conditions of the Declaration, but not otherwise, this Certificate and the interest represented hereby may be conveyed and transferred in full shares of one three thousand two hundred and fiftieths (1/3250ths) each, but not in fractions thereof, by the holder hereof in person or by duly authorized attorney, but only upon surrender of this Certificate, duly transferred, for notation of such transfer upon the books of the Trustee, and the transferee shall, by accepting this Certificate or any Certificate which may be issued in place hereof, become a party to the Declaration and be bound thereby and entitled to all rights thereunder.

IN WITNESS WHEREOF, CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, has caused these presents to be signed in its corporate name, by its President or Vice President, and its corporate seal to be hereto affixed, attested by its Secretary or Assistant Secretary, this Dec. 26, 1929.

CHICAGO TITLE AND TRUST COMPANY,
As Trustee,

By E. A. HACKETT,
Vice President.

Attest:

E. TRAEGER,
Assistant Secretary.

(TITLE CERTIFICATE.)

Chicago Title and Trust Company, individually and not as Trustee, hereby certifies to the registered holder of this Land Trust Certificate that, at the date thereof, there are no conveyances, liens, judgments or pending suits of record in Cook County, Illinois, or in the United States District Court for the Northern District of Illinois, which affect the equitable interest evidenced by the within Land Trust Certificate, other than taxes, assessments, party wall agreements of record, lease mentioned in the Land Trust Certificate and all rights thereunder, and .....

CHICAGO TITLE AND TRUST COMPANY,
By E. A. HACKETT,
Vice President.

NOTE: After a transfer of this Land Trust Certificate has been made, a new examination of the title will be made as of the date of recording such transfer and a new title certificate will be executed upon the new Land Trust Certificate, which will show the condition of the title as disclosed upon such examination.

NOTE: This transfer deals with an interest in Illinois real estate. If the holder hereof is married, the spouse should also execute and acknowledge this transfer. If the proposed transfer is to a corporation first consult the Trustee.

(FORM OF CONVEYANCE.)

The undersigned, ... {bachelor / married / spinster}

and ..... (both) resident(s) of

the City of ....., County of .....,

State of ....., grantor(s), being the owner(s) of Certificate number ....., issued under the provisions of an Agreement and Declaration of Trust, dated as of March 1, 1928, and filed for record in the office of the Recorder of Deeds of Cook County, Illinois, and recorded as Document No. 9956061 in said office, and being the owner(s) of the entire beneficial interest represented by said Certificate in the premises described in said Agreement and Declaration of Trust, for a valuable consideration do... hereby sell, assign, transfer and convey to ....., grantee, according and subject to the terms of said Agreement and Declaration of Trust, an undivided ..... three thousand two hundred and fiftieths of the equitable ownership and beneficial interest in said premises; to have and to hold the same unto the grantee forever; and the grantor(s) covenant(s) that ..he.. ..ha.. not encumbered or permitted to be encumbered the undivided interest hereby transferred.

The undersigned, spouse of the grantor, for a valuable consideration hereby remises and releases to the grantee all right and expectancy of dower in said premises.

The undersigned hereby authorizes said Trustee to make or cause to be made a notation of the above transfer on its books, to have this conveyance recorded in the Recorder's office aforesaid, to cancel the above mentioned Certificate and to issue a new Certificate or Certificates in lieu thereof.

Dated .....

.....(Seal)

.....(Seal)

(FORM OF ACKNOWLEDGMENT TO BE USED WHERE OWNER IS AN INDIVIDUAL AND EXECUTES IN PERSON.)

STATE OF .....,
COUNTY OF ..... } ss:

I, ..., a notary public in and for said county, in the state aforesaid, DO HEREBY CERTIFY that ....., personally known to me to be the same person whose name ..... subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that ..... signed, sealed and delivered the said instrument as ..... free and vountary act, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this ..... day of ....., A. D. 192..

.....

Notary Public.

My commission expires .....

NOTE: The execution of the above instrument of transfer must be acknowledged before a notary public or other officer authorized by the laws of the State of Illinois to take acknowledgments of deeds and in the manner in said laws more particularly set forth to constitute such acknowledgments valid and legal acknowledgments under the then existing laws of said State. If in a foreign country, the acknowledgment may be made before a Consul General, Consul or other consular agent of the United States. In all cases the officer taking the acknowledgment must add his official designation, residence, and

seal, if he has one. When the conveyance is executed by an executor, administrator, guardian, trustee, or a person acting in any other representative capacity, proof of his authority to act must be furnished to the Trustee and must accompany the certificate.

EXHIBIT "7."

Number 978 Interest 6/1050ths

LAND TRUST CERTIFICATE OF EQUITABLE OWNERSHIP

In Property Located on East Sixth Street, Cleveland, Ohio, and Leased to THE FIDELITY MORTGAGE COMPANY

THIS CERTIFIES THAT Max Senior is the owner of six one-thousand-and-fiftieths (6/1050ths) of the equitable ownership and beneficial interest in certain property located at 1940 East Sixth Street, opposite Vincent Street, in the City of Cleveland, Ohio, title to which is held by The Midland Bank of Cleveland, Ohio, as Trustee (hereinafter sometimes referred to as the "Trustee") for the benefit of the holder or holders of this Certificate and of similar Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust. All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust in which said property is specifically described, dated July 1, 1925, between the Trustee as party of the first part, and such persons, partnerships, associations or corporations as may become parties thereto by the acceptance

of Certificates of Equitable Ownership of like tenor herewith, in the trust thereby created, which Agreement and Declaration of Trust (hereinafter sometimes referred to as the "Declaration") is of record in the office of the Recorder of Cuyahoga County, Ohio, and to which Declaration reference is hereby made for a statement of the rights of the holder of this Certificate and all other Certificates issued under the Declaration, in said property and of the terms and conditions of said trust.

The Trustee agrees that it will, on the first (1st) day of January and the first (1st) day of July in each year, beginning January 1, 1926, pay to the holder of this Certificate, as registered on the transfer books of the Trustee as of the twentieth (20th) day of the month next preceding the date of such payment, said holder's pro rata share of the net proceeds which may be derived from the rental from the property described in the Declaration and constituting the Trust Estate, up to a total of Fifty-Five Dollars ($55.00) per year, dating from July 1, 1925, in respect to each one/one-thousand-and-fiftieth (1/1050th) of the equitable ownership and beneficial interest in said property represented by this Certificate, and that upon any sale of said property and termination of the trust, it will pay to the registered holder hereof such holder's pro rata share of the net proceeds derived from such sale, all as in the manner provided in the Declaration.

Whenever in the Declaration or in this Certificate the Trustee is obligated to pay or distribute any sum of money to the holder hereof, it is understood that all such obligations are undertaken by the Trustee in its trust capacity only and not personally and that such payments

and distributions are to be made only out of such funds as the Trustee has in its hands available therefor.

The property described in the Declaration is leased to The Fidelity Mortgage Company for the term beginning July 1, 1925, and ending June 30, 2024, with the privilege on the part of the Lessee of renewing the Lease for successive periods of ninety-nine (99) years each forever, under a Lease by which the Lessee agrees to pay annually, for the first fifteen (15) years of said term, the sum of Fifty-Seven Thousand Seven Hundred Fifty Dollars ($57,750.00), in equal quarterly installments of Fourteen Thousand Four Hundred Thirty-Seven and 50-100 Dollars ($14,437.50) each, in advance, on January 1, April 1, July 1, and October 1, in each of said first fifteen (15) years, beginning July 1, 1925; and thereafter to pay annually the sum of Sixty-Six Thousand Nine Hundred Dollars ($66,900.00), in equal quarterly installments of Sixteen Thousand Seven Hundred Twenty-Five Dollars ($16,725.00) each, in advance, on January 1, April 1, July 1, and October 1, in each year—plus an amount each year sufficient to pay the compensation of the Trustee for its ordinary services in the collection and distribution of the rentals and the general management of the Trust Estate. All amounts accruing from said payments in excess of the amount required to make the aforesaid half-yearly payments to the holders of Certificates actually outstanding at all times and from time to time, and to pay the compensation of the Trustee for its ordinary services in the collection and distribution of the rentals and the general management of the Trust Estate, shall be held, used and disposed of as provided in the Declaration.

Said Lease grants to the Lessee the option to purchase the leased premises at the price provided in the Declaration, but in no event for an amount which will yield less than One Thousand Fifty Dollars ($1,050.00) for and in respect to each one/one-thousandth-and-fiftieth (1/1050th) fractional interest in the Trust Estate, at the time actually outstanding.

The equitable interest represented by this Certificate is subject to optional purchase on and after July 1, 1940, upon call, as provided in the Declaration, but in no event at an amount less than One Thousand Twenty-Five Dollars ($1,025.00), for and in respect to each one/one-thousand-and-fiftieth (1/1050th) fractional interest in the Trust Estate so represented and called for purchase.

The holder of this Certificate, by the acceptance hereof, expressly assents to all the terms and conditions of the Declaration and becomes a party thereto as fully to all intents and purposes as if said holder had signed the Declaration.

Subject to the terms and conditions of the Declaration, this Certificate and the interest represented thereby, or any interest therein, may be assigned and transferred upon the books of the Trustee in full shares of one/one-thousand-and-fiftieth (1/1050th) each but not in fractions thereof, by the holder hereof in person or by duly authorized attorney, but only upon surrender of this Certificate, the appropriate forms provided on the reverse hereof having been duly executed, and the payment of any stamp and/or other taxes payable upon such transfer; and the transferee shall, by accepting this Certificate or any Certificate which may be issued in place hereof,

become forthwith a party to the Declaration and be bound thereby and entitled to all rights of the holders of Certificates thereunder. Until such transfer shall have been made upon the books of the Trustee, the registered holder hereof may be treated as the sole owner of the interest in the Trust Estate represented hereby and the Trustee shall be fully protected in recognizing such registered holder as such owner.

IN WITNESS WHEREOF, THE MIDLAND BANK, TRUSTEE, has caused these presents to be signed in its corporate name by its President or Vice President, and its corporate seal to be hereto affixed, attested by its Trust Officer or Assistant Trust Officer, as of May 29th, 1931.

THE MIDLAND BANK,
Trustee.
By J. B. ROOT,
Vice President.
Attest: J. N. ASKENSBY,
Assistant Trust Officer.

Countersigned: May 29, 1931.
GEO. D. SOMMER,
Transfer Clerk.

[SEAL]

(REVERSE SIDE OF CERTIFICATE)

(FORM OF ASSIGNMENT)

The undersigned, being the owner of the within Certificate, issued by The Midland Bank, Trustee, under the provisions of a certain Agreement and Declaration of Trust of said Trustee, described and recorded as stated

in the body of the within Certificate, and being the owner of a portion of the beneficial interest in the premises described in said Agreement and Declaration of Trust, as evidenced by the within Certificate, does hereby for a valuable consideration sell and convey to .....
....., his heirs and assigns forever, absolutely and in fee, the within Certificate, and all interest therein and in said premises, and hereby authorizes said Trustee to make transfer of the same on its books as provided by the terms of said Agreement and Declaration of Trust.

.....

Dated .....
Signed and acknowledged in the presence of:
.....
.....

(NOTE: Two witnesses are required.)

(FORM OF ACKNOWLEDGMENT TO BE USED WHERE ASSIGNOR IS AN INDIVIDUAL WHO EXECUTES THE ASSIGNMENT IN PERSON.)

STATE OF ....., } ss:
COUNTY OF ..... }

This day personally appeared before me the above named ..... known to me to be the person or party to whom the within certificate was issued, and who executed the foregoing instrument, and acknowledged that he did sign the said assignment and conveyance and that the same is his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at ..... this ..... day of ....., 19....

.....

.....

(FORM OF ACKNOWLEDGMENT WHERE ASSIGNOR IS A CORPORATION)

STATE OF .....,
COUNTY OF ..... } ss:

This day personally appeared before me ..... and ....., known to be to be respectively the ..... and the ..... of ..... and who executed the foregoing instrument on behalf of said corporation, and acknowledged that they did execute the same and that it is the free corporate act and deed of said corporation, and the free act and deed of themselves as such officers.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at ....., this ..... day of ....., 19....

.....

.....

(FORM OF ACKNOWLEDGMENT WHERE ASSIGNOR IS AN EXECUTOR, ADMINISTRATOR, GUARDIAN, TRUSTEE, OR ACTING IN OTHER REPRESENTATIVE CAPACITY.)

STATE OF .....,
COUNTY OF ..... } ss:

This day personally appeared before me ....., the above named ....., who acknowl-

edged that he did sign the foregoing instrument, and that the same is his free act and deed as such .....

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at ....., this ..... day of ....., 19....

.....

.....

NOTE: The execution of the above assignment must be acknowledged before a Notary Public or other officer authorized by the laws of the State of Ohio to take acknowledgments of deeds, whose authority, if outside of the State of Ohio, shall be evidenced by the certificate of the Clerk of the proper court of record. If in a foreign country, the acknowledgment may be made before a Consul General, Consul or other consular official of the United States. In all cases the officer taking the acknowledgment must add his official designation, residence, and seal, if he has one. When the assignment is executed by an executor, administrator, guardian, trustee, or a person acting in some other representative capacity, proof of his authority to act must be furnished and must accompany the certificate.

EXHIBIT "9."

Fee $5.00 No. 4-2-7-1917 "Declaration of Trust"

DECLARATION OF TRUST.

By THE TITLE GUARANTEE AND TRUST CO.

KNOW ALL MEN BY THESE PRESENTS; on the 5th day of February, 1917, The Conrad-Windisch Company did sell

and convey to The Title Guarantee & Trust Company the following described real property, to-wit;

"A lot of land at the northwest corner of Main Street and Patterson Alley, Cincinnati, Hamilton County, Ohio, abutting one hundred feet more or less on Patterson Alley and seventy-six feet, three inches more or less on the west side of Main Street and being all the property on which the Lincoln Inn Court Building is located, said building being included in the conveyance as the improvement thereon."

Now Therefore, said The Title Guarantee & Trust Company of Cincinnati, Ohio, hereby acknowledges, certifies and declares that it holds and will continue to hold the title to said premises for the use and benefit of the holders of certificates of interest in the ground rent hereinafter referred to and upon the following trusts, to-wit;

(1) To lease said premises to Charles F. Dickson for ninety-nine years renewable forever at an annual rental of $5518.75 per annum, payable quarterly and all taxes and assessments of any kind with the privilege of purchase after ten years and at any five years period thereafter for the sum of $127,500, copy of which lease to be executed is hereto attached and made a part hereof.

(2) To execute and issue to purchaser of interests in the premises and in the rent reserved in said lease, temporary certificates of such interest to be replaced with permanent certificates as hereinafter provided.

(3) To execute and issue to purchasers of interest in the premises and in the rent so reserved in said lease, certificates of such interest in substantially the following form, to-wit;

CERTIFICATE OF INTEREST IN GROUND RENT.

Whereas The Title Guarantee & Trust Company on the ..... day of February, 1917, acquired from The Conrad-Windisch Company by deed recorded in Deed Book .... page .... of the records of Hamilton County, Ohio, the premises at the northwest corner of Main Street and Patterson Alley in Cincinnati, fronting seventy-six feet and three inches, more or less, on the west side of Main Street, and being the property on which the Lincoln Inn Court Building is located, and holds the same pursuant to a declaration of trust executed on said date and recorded in Book .... page .... of the records, to which instrument reference is made for all of its terms and conditions, and

Whereas on said ..... day of February, 1917, said Trust Company leased said premises to Charles F. Dickson for ninety-nine years renewable forever, with a privilege of purchase after ten years, and at any five year period thereafter, for the sum of $127,500, and reserved an annual rental of $5519.75, payable quarterly on the ..... day of May, August, November and February, and in addition all taxes and assessments of every kind which lease is recorded in lease Book .... page .... of said records and to which reference is hereby made for all its terms and conditions, and

Whereas ..... has this day purchased and paid for an undivided interest in said premises amounting to ..../1275ths.

Now, Therefore, this certificate witnesseth that said ..... is the owner of an undivided ..../1275ths interest in the premises described in said

lease, and as such owner is entitled to receive ..... proportionate share of the rents reserved and paid under said lease after the deduction therefrom annually of the sum of $100; and that at any time on demand The Title Guarantee & Trust Company will deliver special warranty deeds for undivided interest in said premises, subject to the perpetual lease aforesaid on the surrender of this and other certificates, provided no deed shall be demanded for less than $10,000 par value, of certificates, until after conveyances for $120,000 par value have been made.

By the acceptance of this certificate the holder agrees to become a party to and bound by the terms and conditions of said declaration of trust hereinbefore referred to and agrees that there shall be deducted from the rental reserved in said lease the sum of $100 per year as Trustee's compensation, and that the balance of said rents shall be distributed by said Trustee on the ..... days of May, August, November and February of each year to the owner of this and like certificates registered on the books of said Trust Company.

This certificate shall be transferable only on the books of said The Title Guarantee & Trust Company in person or by attorney upon the surrender of this certificate in such form as said Trust Company may require and transfers of interest in said premises shall not be made in amounts less than 1/1275ths.

In Witness Whereof, said The Title Guarantee & Trust Company has hereunto set its name and affixed its corporate seal, this ..... day of February, 1917.

THE TITLE GUARANTEE & TRUST COMPANY

....

Secretary. *President.*

(ON BACK)

For value received .....
sell, assign and transfer unto ..... the interest represented by the within certificate, and do hereby irrevocably constitute and appoint ..... attorney to transfer said certificate on the books of said The Title Guarantee & Trust Company of Cincinnati with full power of substitution in the premises.

Dated February ....., 1917.

In The Presence of: .....

.....

(4) To collect and receipt for the rental due upon said perpetual lease hereinbefore provided for and after deducting from the gross rental received the sum of $100 per annum for Trustee's compensation, to distribute the balance to the holders of such certificate in proportion to the interest of each.

(5) Upon the demand of one or more holders of such certificates aggregating $10,000 par value, and the surrender of such certificates to convey to such holders jointly by special warranty deed the proportionate part of the fee simple title to said property to which their certificates may entitle them. After conveyances aggregating $120,000 par have been made, the remaining certificate holders may demand a conveyance.

(6) In the event of the said The Title Guarantee & Trust Company desiring to resign as Trustee, it shall

call a meeting of the certificate holders at its office, notice of which shall be mailed prepaid to the last address given by each certificate holder to the Trustee, at least ten days before such meeting and shall submit its resignation to such meeting. At such meeting a new Trustee shall be elected by a majority in interest of the certificate holders and the property hereinbefore described shall be conveyed to such new Trustee by special warranty deed, provided said new Trustee, so designated, shall accept said trust upon the terms and conditions of this instrument. A certificate signed by the Chairman and Secretary of such meeting shall be conclusive evidence of the action there taken.

(7) The value of the trust estate shall be taken and understood to be $127,500 and certificates therefor shall be issued in amounts of 1/1275ths or multiples thereof, and in the event of the exercise of the privilege of purchase reserved in said lease said Trustee shall distribute to the certificate holders the proportions of said purchase price represented by the certificates held by each.

Said certificates shall be transferable only on the books of the Trustee upon surrender thereof, and the acceptance of a certificate shall make the person named therein a party to and bound by the terms of this agreement.

(8) This trust shall continue until the exercise of the privilege of purchase reserved in said lease at which time all certificates must be surrendered to the Trustee, or until the entire property shall have been conveyed pursuant to the provisions of article (5) of this agreement. No Trustee shall be required to give bond and shall be liable only for his or its own acts and no person dealing

with the Trustee shall be required to see to the application of any money paid to the Trustee.

When the privilege of purchase reserved in said lease shall be exercised, the Trustee shall forthwith convey said premises to the lessee or his assigns, and the rights of the certificate holders in said premises shall thereupon cease and determine and be transferred to the proceeds of sale in the hands of the Trustee.

In Witness Whereof, said The Title Guarantee & Trust Company has hereunto set its name and attached its seal, this 5th day of February, 1917.

THE TITLE GUARANTEE & TRUST CO.
By PHILIP HINKLE, Vice President.
WM. THORNDYKE, Secretary.

Signed and acknowledged in the presence of:
JOHN R. SCHINDEL
H. A. BAYLESS
(Corp. Seal)

State of Ohio, Hamilton County, SS:

Before me, a Notary Public in and for said county personally appeared Philip Hinkle, Vice President, and Wm. Thorndyke, Secretary, of The Title Guarantee & Trust Company, the corporation which executed the foregoing instrument who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as Vice President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is the free act and deed of said The Title Guarantee & Trust Company.

In Testimony Whereof, I have hereunto subscribed my name at Cincinnati, this 5th day of February, 1917.

H. A. Bayless,

Notary Public, Hamilton County, Ohio.

(N P Seal)

(Ham. Co., O.)

The undersigned Charles F. Dickson lessee under the lease described in the foregoing Trust agreement hereby approves the terms therein expressed.

Charles F. Dickson.

Cincinnati, February 5, 1917.

This Indenture of Lease,

Made this ..... day of February A. D. 1917, between The Title Guarantee & Trust Company, lessor, and Charles F. Dickson, lessee, Witnesseth; that said lessor for and in consideration of the rents herein reserved and the covenants and agreements hereinafter contained and by the said lessee, his heirs, executors, administrators and assigns to be paid and performed do hereby Grant, Lease and Demise unto said lessee, his heirs, executors, administrators, successors and assigns all the following described real estate in the City of Cincinnati, County of Hamilton and State of Ohio, to-wit;

A lot of land at the North-West corner of Main Street and Patterson Alley in the City of Cincinnati, abutting one hundred feet more or less on Patterson Alley and seventy-six and two-thirds feet more or less on the West side of Main Street, and the improvements thereon being all the property on which the Lincoln Inn Court Building is located and said building.

To have and to hold the same together with the privileges and appurtenances thereunto appertaining and belonging unto the said lessee, his heirs, executors, administrators, successors and assigns for and during the full term of Ninety-nine years next ensuing from the ..... day of February, 1917, fully to be completed and ended and renewable forever.

The said lessee, his heirs, executors, administrators and assigns, Yielding and Paying therefor unto the said lessor its successors and assigns yearly and every year during this demise the sum of Fifty-five Hundred and Eighteen and 75/100 dollars payable in quarterly installments of Thirteen Hundred and Seventy-nine and 69/100 dollars each on the ..... days of February, May and August of each year and Thirteen Hundred and Seventy-nine and 68/100 on the ..... day of November of each year the first to be paid on ..... day of May in the year 1917.

The said lessee, for himself and for his heirs, executors, administrators and assigns does hereby Covenant and Agree to and with the said lessor its successors and assigns, as follows, viz;

To pay the rent above reserved as above specified to pay all taxes, rates, charges and assessments of every kind that may at any time during this demise be levied, rated, charged or assessed on said premises, or any part thereof for any purpose whatsoever.

To keep the buildings now or hereafter erected on said land at all times insured against loss by fire in not less than the sum of Ninety Thousand ($90,000.00) dollars in companies satisfactory to, and by policies approved by and payable to the lessor, its successors, or assigns, to

whom they shall be delivered on request and to pay the cost of all such insurance; if said buildings shall be damaged or destroyed by fire, the recovery thereon shall be applied to restoring the same or at the option of the lessee shall be paid to the lessor, its successors or assigns as a partial payment on account of the privilege of purchase herein contained and the rents shall thereafter be ratably reduced.

And to maintain insurance against loss by loss by fire of rents derived from tenants occupying said leased building to the extent of Fifteen Thousand Dollars ($15,000.00) loss payable to lessors, its successors or assigns, to whom the policies shall be delivered on request, and to pay the costs of all such insurance.

Not to commit or suffer any waste upon said premises; to peaceably and quietly deliver up the same to the said lessor, its successors or heirs or assigns at the expiration of said term or sooner determination of this lease.

That the said lessor, its successors or assigns shall have the first lien upon every right and interest of the lessee and all claiming under said lessee, to or in the said premises and the improvements thereon to secure the payment of said rents and insurance premiums and the performance of the lessees' covenants herein.

And the said lessor for itself and for its successors and assigns covenants and agrees to and with the said lessee, his heirs and assigns, that paying the rents and performing the covenants aforesaid, they shall and may peaceably and quietly have and enjoy the aforesaid premises, with the appurtenances for and during the term aforesaid free from any let or hinderance by any person or persons whatsoever, claiming by through or under said lessor

and further, that (all rents, taxes and assessments being paid and all covenants being performed by said lessee, as herein stipulated) said lessor, its successors and assigns will at any time within thirty days after the end of the first ten year period and of each five year period thereafter convey the said premises to the said lessee, his heirs, and assigns by a good and sufficient deed of special warranty, with release of dower, upon the payment during the continuance of this lease to it or them by said lessee, his heirs or assigns, of the sum of One Hundred and Twenty-Seven Thousand Five Hundred Dollars, ($127,500.00) provided that lessee shall give lessor at least sixty days prior written notice of his intention to exercise his privilege of purchase.

Provided, however, and these presents are upon these express conditions, that if, at any time the rent aforesaid or any part thereof shall be in arrear or unpaid for the space of thirty days after the same shall have become due and payable and after demand of payment made personally or on said premises, which demand shall be equally good and effectual whether made on the day of payment or at any time afterward, or if the said lessee, his heirs, executors, administrators, successors or assigns, shall fail to pay said taxes, rates, charges and assessments, or any part thereof, as the same become payable or shall fail faithfully to keep and perform any other covenant or agreement herein contained, then or in either such case, this lease (if the said lessor, its successors or assigns so elect) shall cease, determine and be void, and it shall be lawful for it or them to enter upon the said premises with the appurtenances or any part thereof, in the name of the whole and the same to occupy

and repossess as though this demise had not been made.

In Witness Whereof, the said The Title Guarantee & Trust Company by its President and William Thorndyke its secretary has hereunto and to a duplicate hereof set its name and attached its seal and Charles F. Dickson has hereunto set his name.

Signed and acknowledged in presence of us:

....

....

....

[Duly verified.]

Rec'd for Record Feb. 7th, 1917, at 10:18 A. M., Ind. Bk., 1, P. 422.

RECORDER'S OFFICE.

THE STATE OF OHIO, } ss:
COUNTY OF HAMILTON. }

I, Leo H. Beckman, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of Trust Agreement from Declaration of Trust to Title Guarantee & Trust Company.

RECEIVED and recorded on the 7th day of February, 1917, at 10:18 o'clock A. M., in Deed Book No. 1147, Page 411, Hamilton County, Ohio, Records, and I further certify that I am a keeper of said records and books.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed my official seal at Cincinnati, this 19th day of March, A. D. 1932.

LEO H. BECKMAN,
Recorder.

[SEAL]

EXHIBIT "10."

AGREEMENT AND DECLARATION OF TRUST.

BETWEEN

CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE

AND

THE HOLDERS OF LAND TRUST CERTIFICATES OF EQUITABLE OWNERSHIP IN THE CLARK-RANDOLPH BUILDING SITE

Located in Chicago, Illinois

Dated as of March 1, 1928

Filed in the office of the Recorder of Deeds of Cook County, Illinois, on March 15, 1928, as Document No. 9956061.

AGREEMENT AND DECLARATION OF TRUST, dated for convenience March 1, 1928, but actually executed March 13, 1928 (hereinafter sometimes called the "Declaration"), between CHICAGO TITLE AND TRUST COMPANY (of Chicago, Illinois), a corporation organized and doing business under the laws of the State of Illinois and duly empowered and authorized to do a trust business under the laws of said State, as Trustee (hereinafter called "Trustee"), party of the first part, and WILLIAM G. POHL and such persons, partnerships, associations and/or corporations, as may hereafter become parties hereto by the acceptance of Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called "Beneficiaries"), parties of the second part,

WITNESSETH:

That the said Trustee and the holders of Certificates issued and to be issued hereunder do hereby, in consideration of their mutual covenants, make the following

agreement and declaration of trust with respect to the property hereinafter described.

ARTICLE I.

The Trustee hereby agrees that it will hold as Trustee upon the trusts hereinafter set forth, for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called "Land Trust Certificates"), the title acquired by the Trustee by a certain deed dated as of March 1, 1928, but in fact executed and delivered simultaneously herewith, from one William G. Pohl of the City of Chicago, County of Cook, and State of Illinois, and Cecilia Louise Pohl, his wife, and filed for record in the office of the Recorder of Cook County, Illinois, on the .... day of March, 1928, as Document No. 9956060, to the following described premises situated in the City of Chicago, County of Cook, and State of Illinois, and bounded and described as follows, to wit:

Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original Town of Chicago.

The interest of the Trustee in said premises is hereinafter sometimes referred to as the "trust estate." As set forth in said deed, said premises are subject to a certain Indenture of Lease by and between the said William G. Pohl as "Lessor" and Cecilia Louise Pohl, his wife, as parties of the first part, and Leo M. Sage, as "Lessee" (hereinafter sometimes referred to as the "Lessee"), as party of the second part, dated as of March 1, 1928, and filed for record in the office of the Recorder of Cook County, Illinois, on the 15th day of

March, 1928, as Document No. 9956059, to the lease and the record thereof reference is hereby made for all the terms and conditions thereof. Said William G. Pohl and Cecilia Louise Pohl, his wife, have by said deed dated as of March 1, 1928, likewise simultaneously herewith assigned, set over, transferred and conveyed to the Trustee all their right, title and interest under said lease.

Said lease provides, among other things, as follows (reference being made to said lease, however, for a more explicit statement thereof):

(a) The term of said Lease is from March 1, 1928, to February 28, 2027, renewable, at the option of the Lessee, for one additional term of ninety-nine (99) years.

(b) The Lessee agrees to pay to the Lessor annually during each of the years of the term of the Lease the sum of One Hundred and Seventy Thousand and Six Hundred and Twenty-five Dollars ($170,625), in equal quarter-annual installments payable on January 15, April 15, July 15, and October 15 in each year, commencing April 15, 1928, for the quarter ending May 31, 1928, and also covenants to pay all taxes, assessments, levies and public charges of every kind and character which are or may be levied and assessed upon the leased premises or any improvements thereon, and also charges, costs and expenses of the Trustee under this Declaration, and certain other amounts, all as provided for in the Lease.

(c) The Lessee agrees to create in the hands of the Lessor a Depreciation Fund and to make quarterly payments into said Fund on the fifteenth days of January, April, July and October in each year, beginning January 15, 1930, said quarterly payments varying in amounts but aggregating the sum of Two Million Five Hundred Thousand Dollars ($2,500,000), and the said Lease provides the terms and conditions under which said Fund is to be held and disposed of.

ARTICLE II.

The equitable ownership and beneficial interest in the Trust Estate is divided into three thousand two hundred and fifty (3,250) indivisible equal shares, (each share representing 1/3250th part of the equitable ownership of said trust estate) which shares shall be represented by Certificates of Equitable Ownership, said Certificates being referred to and designated as "Land Trust Certificates," varying only as to the respective numbers, names of the respective Beneficiaries, and the number of shares represented by the Certificates, and being in substantially the following form, to wit:

(See Exhibit 2, pages 67 to 75, for form of certificate.)

Simultaneously with the execution of this instrument, and for and in consideration of the said conveyance from said William G. Pohl and wife to said Trustee hereinbefore mentioned, said Trustee has issued to, and in the name of, said William G. Pohl a Land Trust Certificate or certificates representing the entire three thousand two hundred and fifty (3250) shares in the trust hereby created and evidencing the entire equitable ownership of said Trust Estate.

In case any Land Trust Certificate issued hereunder shall become mutilated or be destroyed, stolen or lost, the Trustee may thereafter in its discretion issue in lieu thereof a new Certificate representing the interest represented by such mutilated, destroyed, stolen or lost Certificate, in exchange and substitution for the Certificate mutilated, upon cancellation thereof, or in lieu of and in exchange and substitution for the Certificate destroyed, stolen or lost, upon the registered holder filing with the

Trustee evidence satisfactory to the Trustee that such Certificate was destroyed, stolen or lost, and of such holder's ownership thereof, and furnishing the Trustee indemnity in form and with surety or security satisfactory to it, and for the benefit of all interested parties.

ARTICLE III.

The Trustee agrees that, after payment of the compensation of the Trustee provided to be paid in Article X hereof, and after payment of, (1) the expenses of administering this trust, (2) any taxes, charges, assessments, and any and all amounts, which the Lessor under said Lease is authorized or permitted to pay for and on behalf of the Lessee for the protection of the Trust Estate free from lien, charge or encumbrance of any kind or character whatsoever, (3) any Federal or other income tax or taxes, which under any present or future law, the Trustee may be required to pay or withhold upon the receipt by it of the amounts payable to it under the provisions of said Lease, and/or (4) any other tax, charge, assessment or liability which the Trustee may be required to pay, and subject to the provisions of this Declaration, it will distribute among the Beneficiaries (and in such distribution, the shares, if any, held in the Depreciation Fund shall share ratably with all other outstanding shares) in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all the net proceeds of rentals which may be received by it under the terms of the Lease. The portion thereof which is allocable to the Certificates in the Depreciation Fund shall be paid into the Depreciation Fund and shall be dealt with in the same manner as

the income derived from other securities in the Depreciation Fund; such distribution to be made semi-annually on the first days of June and December in each year, the first of said distributions to be made June 1, 1928, for the quarter ending May 31, 1928, and thereafter for the semi-annual periods ending November 30, and May 31, and such payment may be made by check at par in Cleveland, Ohio, or Chicago, Illinois, exchange, and shall be mailed to the holders of Certificates as registered on the Trustee's transfer books as of the twenty-fifth day of the month preceding each such distribution and at their respective addresses as registered on said books. Any such funds not collected by such Certificate holders shall be held by the Trustee without interest to the credit of such holders. The portion of such net proceeds allocable to the Certificates in the Depreciation Fund shall be dealt with as any other income received by the Lessor under said Lease on securities in the Depreciation Fund.

ARTICLE IV.

SECTION 1. As provided in the Lease, the Lessee has the option to purchase the entire property comprising the Trust Estate, for the sum of Three Million, Four Hundred Twelve Thousand, Five Hundred Dollars ($3,412,500) if the option is exercised on or before March 1, 1929, and thereafter at such sum less Sixteen Thousand, Two Hundred, Fifty Dollars ($16,250) for and during each year thereafter until the above price as reduced by such deductions, shall be Three Million, Two Hundred Sixty-six Thousand, Two Hundred Fifty Dollars ($3,266,250), and thereafter at this last named sum, plus in each case accrued rental to date of purchase, plus all sums,

if any, for which the Lessee is in default of payment under said lease, plus all unpaid expenses and/or charges of the Trustee and a reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof; provided that there shall be credited on such purchase price an amount equal to the call purchase price (as hereinafter defined) of the Land Trust Certificates in the Depreciation Fund.

Upon the exercise by the Lessee of the option to purchase the Trust Estate, the Trustee, upon receipt of the option price after deducting all necessary expenses, including reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, shall distribute the net proceeds among the Beneficiaries holding outstanding certificates (other than certificates in the Depreciation Fund), in accordance with the respective interests held by them as evidenced by their several certificates and upon their surrender thereof. Thereupon, all certificates so surrendered and/or in the Depreciation Fund shall be canceled by the Trustee, and any cash and/or securities thereafter remaining in the hands of the Trustee hereunder shall be delivered to the Lessee, except such moneys as are then required to be retained by the Trustee as provided in Section 5 of this Article IV.

Section 2. Upon the sale by the Trustee of the entire property comprising the Trust Estate, pursuant to and because of a default by the Lessee in any of the provisions of the lease, the Trustee, upon receipt of the sale price after deducting all necessary expenses, including reason-

able compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, shall distribute the net proceeds of such sale, together with all cash and/or securities then in the Depreciation Fund or which have otherwise become the absolute property of the Lessor under the provisions of said lease, among the Beneficiaries holding outstanding certificates (other than certificates in the Depreciation Fund), in accordance with the respective interests held by them as evidenced by their several certificates and upon their surrender thereof. Thereupon all certificates so surrendered and/or in the Depreciation Fund shall be canceled by the Trustee.

SECTION 3. Upon the sale by the Trustee of the entire property comprising the Trust Estate prior to the termination of the lease, the Trustee, upon receipt of the sale price after deducting all necessary expenses, including reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, shall distribute the net proceeds of such sale (except such portion thereof as is allocable to the certificates in the Depreciation Fund) among the Beneficiaries holding outstanding certificates (other than certificates in the Depreciation Fund), in accordance with the respective interests held by them as evidenced by their several certificates and upon their surrender thereof. Thereupon, all certificates so surrendered and/or in the Depreciation Fund shall be canceled by the Trustee. For the purpose of ascertaining the portion of the net proceeds of such sale which is allocable to the certificates in the Depreciation Fund, the certificates in the Depreciation Fund shall

share ratably with all outstanding certificates. The portion of such net proceeds allocable to the certificates in the Depreciation Fund, together with all cash and/or securities then in the Depreciation Fund held by the Trustee, as well as all other moneys then in the hands of the Lessor under the lease, shall be delivered to the purchaser at such sale and be held and disposed of by such purchaser as in the lease provided.

SECTION 4. The Trustee is fully authorized to complete any sale referred to in Sections 1, 2 and/or 3, full power and authority being hereby vested in it in connection with such sale to execute all conveyances, releases, cancellations, assignments and/or other transfers of the property sold as may be necessary or proper to convey title thereto, without securing any consent from the Beneficiaries, and any conveyance by the Trustee shall operate to divest all interest of the Beneficiaries in the property so conveyed, the interest of the Beneficiaries being transferred to the proceeds of sale as provided by the terms of this Declaration.

SECTION 5. Notice of any distribution to be made by the Trustee as provided in Sections 1, 2, and/or 3 of this Article shall be given by registered letter, mailed to the respective Beneficiaries at their several addresses appearing on the transfer books of the Trustee. If after notice has been given as aforesaid, the holder or holders of any outstanding Certificates shall fail or neglect to present the same at the time and place in said notice specified, the Trustee shall place to the credit of each outstanding Certificate the distributive share to which its holder is entitled and shall be subject to no further liability and under no further duty to the Beneficiary

holding the same under the trusts created by this instrument, except to pay to said holder such distributive share upon demand and upon the surrender of said Certificate, nor shall it be required to pay interest upon any fund so credited.

SECTION 6. The shares of equitable ownership represented by Land Trust Certificates issued hereunder are subject to call purchase by the Trustee, at the request of the Lessee, for the Depreciation Fund described in the Lease, at the call purchase price of Ten Hundred and Fifty Dollars ($1050) during the first year, that is at any time on or before March 1, 1929, and thereafter at such sum less Five Dollars ($5) for each year or fraction thereof until the price shall have been so reduced by such deductions to Ten Hundred and Five Dollars ($1005) for each share representing an undivided 1/3250th equitable ownership in said trust estate, plus in each case accrued rental to date of call purchase at the rate of Fifty-Two Dollars and Fifty Cents ($52.50) per share per annum, upon the following terms and conditions, to wit:

The Lessee may notify the Trustee to apply any moneys then in the Depreciation Fund, including the proceeds of any securities held in the Depreciation Fund, to the call purchase of shares of equitable ownership represented by Land Trust Certificates, and upon the receipt of such notice the Trustee shall determine by lot, in any manner selected by it, the numbers of Certificates evidencing shares to be purchased up to the amount so specified in the request from the Lessee, and shall thereupon give to the registered holders of the Certificates so designated, not less than fifteen (15) days' written

notice, mailed first-class postage prepaid, to such holders at their respective addresses appearing on the transfer books of the Trustee, of such call purchase of the shares evidenced by the Certificates so designated, and the date fixed for such purchase, and upon the date so designated for the purchase of such shares the holders of such shares shall be entitled, in respect to each share so called for purchase, to the call purchase price thereof as hereinabove specified, and thereafter shall have no other or further interest in the Trust Estate in respect to each share so called for purchase, and on presentation and surrender of such Certificates in accordance with such notice at the principal office of the Trustee, the holders of such Certificates evidencing the shares so called for purchase shall be entitled to receive, in respect to each share so called for purchase, such call purchase price and no more. Upon call purchase of any of said shares and notice mailed as aforesaid, the holders of the Certificates evidencing the shares so called for purchase will deliver the same to the Trustee, duly transferred to the Trustee and acknowledged as provided on said Certificates. If the shares so called for purchase shall be less than the entire number of shares evidenced by such Certificates so surrendered, the Trustee shall issue a new Certificate evidencing the equitable interests not so called for purchase. The shares so purchased shall be transferred to the Trustee and in its name and be held as a part of the Depreciation Fund as set forth in the Lease, and no merger of the equitable and legal title shall result therefrom. If after notice has been given as in this paragraph provided, the holder or holders of any shares so called for purchase shall fail or neglect to present the same at

the time and place in said notice specified, the Trustee shall place to the credit of each such share the call purchase price and shall be subject to no further liability and under no further duty to the Beneficiary holding such share, except to pay to the holder of each such share the call purchase price thereof, upon demand and upon surrender of such certificate, nor shall the Trustee be required to pay interest upon any fund so credited.

SECTION 7. In case upon the expiration of the original term of ninety-nine years of the lease the Trustee as Lessor shall, pursuant to the provisions of Section 6 of Article Three of the Lease, become the owner of the cash and/or securities, including any of said Land Trust Certificates, then in the Depreciation Fund, the Trustee shall distribute pro rata to the owner or owners of the certificates issued hereunder and then outstanding (other than certificates in the Depreciation Fund), all cash and/or securities, including any of said Land Trust Certificates, then in the Depreciation Fund.

ARTICLE V.

As the entire premises constituting the Trust Estate are leased for Ninety-nine (99) years, renewable, at the option of the Lessee, for one additional term of Ninety-nine (99) years, the ordinary duties of the Trustee shall be restricted to the collection of rent from the Trust Estate and the distribution of the net rentals thereof as herein provided.

In the event that the Lessee shall make default in any of the provisions of the Lease, so that it shall become necessary, or in the opinion of the Trustee advisable, for the Trustee to terminate the same, then the Trustee shall

have full authority to terminate the Lease and to sell the Trust Estate and terminate the trust, and in such case or in any other contingency either with or without terminating the lease to take such other action with respect to the Lessee, the Lease or the Trust Estate as it shall deem advisable, without reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof, and no person dealing with the Trustee shall be bound or privileged to inquire concerning the authority of the Trustee so to act.

ARTICLE VI.

No Beneficiary as such shall have any legal title to the trust property itself, or any part thereof, real or personal, held by the Trustee, his interest being an equitable estate only, and he shall have no right to call for any partition of the Trust Estate during the continuance of the trust, any and all such rights being waived by the Beneficiaries, by acceptance of the Land Trust Certificates. Neither the death of a Beneficiary nor any transfer by operation of law of the interest of a Beneficiary during the continuance of this trust shall operate to terminate the trust, nor shall it entitle the legal representative of a deceased Beneficiary to an accounting or to take any action in the courts or otherwise against the Trust Estate or the Trustee.

Notwithstanding any transfer by operation of law of the interest, or any part thereof, of a Beneficiary as aforesaid, the Trustee shall be fully protected in paying and accounting to the personal representatives of any deceased Beneficiary with respect to all matters arising under this trust, and the rights of any such transferee

shall accrue and be enforcible against and be binding upon such personal representatives and not against or upon the Trustee or the Trust Estate until such transferees shall have established to the satisfaction of the Trustee their succession to such interests.

If the interest of any Beneficiary shall be devised to a trustee or trustees, the Trustee hereunder shall be protected in dealing with such representative without reference to any question of the capacity of such trustee to act in the State of Illinois, and all persons claiming under such deceased Beneficiary shall be estopped to compel any accounting as against the Trustee hereunder.

ARTICLE VII.

No assessment shall ever be made upon the Beneficiaries, and the Trustee shall have no power to incur any obligation which shall render the Beneficiaries personally liable, and in any written contract made by the Trustee reference shall be made to this instrument, and the person or corporation contracting with the Trustee shall look only to the funds and property of the trust for payment under such contract, or for the payment of any debt, note, judgment or decree, or of any money that may otherwise become due and payable by reason of the failure on the part of the Trustee to perform such contract in whole or in part, or for any other cause, and neither the Trustee nor the Beneficiaries, present or future, shall, in any event, be personally liable therefor.

ARTICLE VIII.

The Trustee shall keep a register of the names and interests of the Beneficiaries hereunder, and proper

transfer books, and books of account showing the receipts and disbursements of the Trust Estate. Such books of account and transfer, including the register of names and interests, shall at all reasonable times be open to the inspection of any Beneficiary or his personal representatives, in so far as they relate to the interest of such Beneficiary, but not as they relate to the interest of any other Beneficiary.

Land Trust Certificates and the equitable interest in the trust estate evidenced thereby may be transferred and conveyed in full shares, but not in fractions thereof, by the owner or owners thereof, in person or by attorney duly authorized, and upon presentation to the Trustee of any such Certificate, duly executed for transfer in the form hereinbefore recited conveying the equitable interest evidenced by such Certificate, the Trustee will execute and deliver to such transferee a new Land Trust Certificate or Certificates representing the equitable interest in the Trust Estate so transferred in full shares thereof, but not in fractions thereof, and such transferee shall, by accepting such Certificate (and the equitable interest evidenced thereby) so transferred to him, or any new Certificate issued in place thereof, become a party to the Declaration and be bound thereby and entitled to all of the rights thereunder. The Trustee shall be entitled to rely on the record of ownership as shown on its books.

At the time of noting each transfer of a Land Trust Certificate (and the equitable interest evidenced thereby) upon its books the Trustee will file for record in the office of the Recorder of Deeds of Cook County, Illinois,

the writing evidencing each such transfer, and will employ Chicago Title and Trust Company or other title Company to make a search of the records of such county and of the United States District Court for the Northern District of Illinois, and to report as to the existence of any liens, conveyances, encumbrances, judgments and/or pending suits of record (except taxes, assessments and existing leases), affecting the equitable interest so transferred, and to execute its certificate of such search upon each new Land Trust Certificate issued upon each transfer. The Trustee, from the compensation to be paid to it for its ordinary duties hereunder and not otherwise, will recompense Chicago Title and Trust Company or other title Company for such services, and will pay the expenses in recording such transfers. The Trustee shall be entitled to reasonable compensation from any certificate holder for any additional services requested of the Trustee by such certificate holder.

ARTICLE IX.

The Trustee does not warrant its title as owner of the premises hereinbefore described as the Trust Estate, nor the interest of any Beneficiary nor make any representations with reference thereto, nor does it warrant the validity of the Lease, nor of any other lease of the said premises which may hereafter be made, nor guarantee the performance of the covenants thereof by the Lessee or any Lessees thereunder.

The Trustee shall be protected in acting upon any notice, request, consent, affidavit, certificate, assignment,

note or other paper or document believed by it to be genuine and to be signed by the proper party.

The Trustee at any time hereunder may in its individual capacity or as trustee for any person or estate own or acquire Land Trust Certificates to the same extent and with the same effect as if it were not Trustee hereunder.

The Trustee shall be entitled to indemnity from the Trust Estate for any personal liability or expense by it incurred in the administration of this trust, except such as may arise from its personal and willful default.

The Trustee shall have full power to compromise and settle claims either in contract or tort made against it or against the Trust Estate.

The Trustee shall have full power to exercise all of the rights, remedies, powers and privileges of the Lessor under said Lease including the right to execute a renewal of said Lease for a term of ninety-nine (99) years in case the Lessee shall exercise the option for the renewal for said term in said Lease contained and shall prior to the actual termination of said Lease have the right to waive any defaults of the Lessee under the Lease.

The Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of this trust so long as it acts in good faith; nor shall it be personally liable for the acts or omissions of any officer, agent, servant or employee, selected or appointed by, or acting for, it (reasonable care having been used in their selection), and it shall not be obliged to give any bond to secure the due performance of this trust by it.

The Trustee shall have the power, in the event that it should become necessary for it to provide funds to meet a temporary exigency arising in connection with the Trust Estate, or to enable it to comply with any of the provisions of said Lease, to make advances at reasonable or customary rates of interest or borrow money and give notes or other security therefor binding the income and assets of the trust, but not the Trustee or Beneficiaries personally. Any such advances or indebtedness may be paid by the Trustee prior to and ahead of any other disbursement made by it.

The Trustee may advise with legal counsel, and any action or failure to act under this Trust Agreement in good faith by the Trustee in accordance with the opinion of such counsel shall be conclusive on the Beneficiaries, and the Trustee shall be fully protected in respect thereof.

Whenever in this instrument or in any Land Trust Certificate issued hereunder, the Trustee is obligated to pay or distribute any sum of money to the holders of such Land Trust Certificates or to any other person, it is understood that all such obligations are undertaken by it in its trust capacity only and not personally, and that such payments and distributions are to be made only out of such funds as the Trustee has in its hands available therefor.

The Trustee shall have the exclusive right to control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof,

and shall not be subject to any obligations to the Beneficiaries other than such as are expressly assumed hereunder.

ARTICLE X.

The compensation of the Trustee for its ordinary services hereunder shall be at the rate of Seven Thousand Dollars ($7000) per year for and during the years of this trust, payable quarterly on the 15th days of January, April, July and October of each year, the first of said installments being payable April 15, 1928; said compensation being the additional rental payable by the Lessee pursuant to the provisions of Section 2 of Article Two of the Lease, and in the event that it should become necessary for the Trustee at any time to render extraordinary services in the carrying out of any of the provisions of the trust created by this Declaration, it shall be entitled to receive additional reasonable compensation therefor, and such compensation, together with any and all expenses, charges or liabilities made, incurred or discharged by the Trustee under the terms and conditions of this Declaration, shall be a lien against and paid from the Trust Estate and/or the income derived therefrom; provided, however, that if extraordinary services shall be rendered by the Trustee with respect to any particular Land Trust Certificate or with respect to the interest evidenced thereby, or any part thereof, and not with respect to the trust estate as a whole, then compensation for such services, together with any and all expenses, charges or liabilities made, incurred or discharged by the Trustee in connection therewith shall be a lien against

the interest evidenced by such certificate and be paid from the proceeds thereof and/or the income therefrom.

ARTICLE XI.

In the event that the Trustee or any successor hereafter appointed shall desire to relinquish the trust evidenced by this agreement the Trustee shall select a successor Trustee believed by it to be competent, and shall give notice of such resignation, and appointment of a successor Trustee to all the Beneficiaries, either by registered letter sent to their addresses registered on the transfer books of the Trustee, such notice to be deemed to have been given by the mailing of said letter, or by publication once a week for four weeks in one newspaper published and of general circulation in the City of Chicago, Illinois. The Trustee shall file for record in the Recorder's Office of Cook County, Illinois, a copy of such resignation. In the event of a vacancy occurring in the office of the Trustee, by resignation or otherwise, and the failure or neglect of the predecessor Trustee to select a successor, then any Beneficiary or the predecessor Trustee may apply to a court of general equity jurisdiction in Cook County, Illinois, for the appointment of a successor Trustee. The successor Trustee appointed by either of the methods above provided shall be vested with the title, property, powers, rights, discretions and immunities of the predecessor Trustee, and upon conveying the Trust Estate to a successor Trustee appointed by either of the methods above provided and upon accounting for all funds which have previously come into its possession, and surrendering all certificates, papers and documents

held by it in connection with said trust, the predecessor Trustee shall be discharged from further liability.

Any successor Trustee appointed under the provisions of this Article shall be a bank or trust company authorized to do a trust business in Chicago, Illinois, if there be such, willing and able to accept the trusts hereunder upon the terms herein set forth. Such successor corporation shall file for record in the Recorder's Office its acceptance as Trustee hereunder.

In the event of the consolidation or merger of Chicago Title and Trust Company or of any successor Trustee, with any other corporation, such consolidated corporation shall succeed to the title and rights of the original Trustee, subject to the terms and conditions of this Trust Agreement. The purchase of the assets and the assumption of the liabilities of any corporation then Trustee hereunder, shall be treated as a merger or consolidation, as provided for in this Article.

ARTICLE XII.

The term "Trustee" shall be deemed to include Chicago Title and Trust Company, as Trustee, or any successor which or who may hereafter be appointed under any of the provisions of this instrument, and any such successor Trustee shall be vested with all of the title, property, powers, rights, discretions and immunities which are herein vested in the Trustee herein named. The term "holder" or "holder of Land Trust Certificates", wherever used in any Land Trust Certificate issued hereunder, or in this Declaration with reference to any Land Trust Certificate, shall mean the owner of the equitable interest in the Trust Estate evidenced by such

Land Trust Certificate as registered on the books of the Trustee.

ARTICLE XIII.

By the acceptance of any Certificate issued hereunder, the original or any successive holder shall be deemed to assent to all of the provisions contained in this Declaration.

ARTICLE XIV.

This Declaration may be amended from time to time or the trust terminated by written instrument executed and acknowledged by the Trustee and consented to in writing by the owner or owners of three-fourths (¾ths) of the outstanding shares issued hereunder, other than shares in the Depreciation Fund; provided, however, that no such amendment shall increase the liabilities of the Lessee under the Lease without its consent and provided further that no such amendment shall deprive or take from the Trustee the control and/or discretion conferred upon it under this Declaration, or confer upon the owner or owners of outstanding shares issued hereunder, or any of them, any control over or voice in the administration of this Trust. A copy of any such instrument shall be filed by the Trustee in the Recorder's office of Cook County, Illinois.

Unless sooner terminated this trust shall terminate upon the expiration of the Lease hereinbefore mentioned, or if said Lease shall be renewed, then upon the expiration of the term of said renewal. In any case of the termination of this trust otherwise than upon the exercise by the Lessee of its option to purchase the Trust Estate, distribution shall be made by the Trustee in kind by con-

veyance of the Trust Estate in undivided legal interests, or at the election of the Trustee, by sale and distribution of proceeds as in this Declaration provided. Upon a conveyance by the Trustee of the Trust Estate in undivided legal interests, as herein provided, all of the Certificates issued hereunder and then outstanding, including those in the Depreciation Fund, as well as any held by the Lessee, shall be cancelled by the Trustee.

The Trustee shall have full power and authority at any time to sell the Trust Estate and to execute and deliver all appropriate instruments to effectuate such sale, provided that the owner or owners of three-fourths (¾ths) of the outstanding shares issued hereunder, other than shares in the Depreciation Fund, shall consent in writing to such sale.

Said William G. Pohl, sole original beneficiary under the foregoing agreement and declaration of trust, and said Cecilia Louise Pohl, his wife, join herein to signify their assent to the terms hereof.

In Witness Whereof, said Chicago Title and Trust Company as Trustee, has caused these presents to be signed in its corporate name by its Vice President and its corporate seal to be hereunto affixed and attested by its Assistant Secretary, and the said William G. Pohl and Cecilia Louise Pohl, his wife, have hereunto set their hands and seals, all as of the day and year first aforesaid, in quadruplicate.

Chicago Title and Trust Company,
As Trustee.

[seal]

[Duly executed and acknowledged.]

EXHIBIT "19."

AGREEMENT AND DECLARATION OF TRUST.

BETWEEN

THE MIDLAND BANK, AS TRUSTEE,

AND

THE HOLDERS OF LAND TRUST CERTIFICATES OF EQUITABLE OWNERSHIP IN PROPERTY

Located on East Sixth Street, Cleveland, Ohio,

and Leased to

The Fidelity Mortgage Company

Dated July 1, 1925

AGREEMENT AND DECLARATION OF TRUST, dated for convenience July 1, 1925, but actually executed 1925, (hereinafter sometimes called the "Declaration"), between THE MIDLAND BANK, of Cleveland, Ohio, a corporation organized and doing business under the laws of the State of Ohio, as Trustee (hereinafter sometimes called "Trustee"), Party of the First Part, and such other persons, partnerships, associations or corporations as may become parties hereto by the acceptance of Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called "Beneficiaries"), Parties of the Second Part,

WITNESSETH:

That the parties do hereby, in consideration of their mutual covenants, make the following Agreement and Declaration of Trust with respect to the premises hereinafter described:

ARTICLE I.

The Trustee hereby declares that it holds and will hold as Trustee for the use and benefit of all present and fu-

ture holders of the Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called "Land Trust Certificates"), the title to the premises acquired by the Trustee by deed from The Fidelity Mortgage Company, filed , 1925, in the Office of the Recorder of Cuyahoga County, Ohio, as instrument No. and described as follows:

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being part of Original Two Acre Lot No. 92, and bounded and described as follows:

(1) Beginning in the Westerly line of East 6th Street (formerly Bond Street) at a point 131 feet 11⅞ inches Northerly measured along said Westerly line from its intersection with the Northerly line of Euclid Avenue, said point of beginning being 22 feet 3 inches Northerly from the angle in the West line of said street; thence South 79 degrees 50′ West and parallel with the Northerly line of Euclid Ave., 61 feet 9 inches to the Southeasterly corner of a parcel of land conveyed by Liberty E. Holden and wife to C. G. King and others by deed dated January 11, 1889, and recorded in Volume 438, Page 504, of Cuyahoga County Records; thence North 29 degrees 34′ East along the Easterly line of the land so conveyed to King and others, 38 feet 11¼ inches to the Northerly corner thereof; thence North 29 degrees 34′ East along the Westerly line of a parcel of land conveyed to C. G. King and others to Liberty E. Holden and Delia E. Holden, by deed dated January 11, 1889, and recorded in Volume 443, Page 459, of Cuyahoga County Records, about 71 feet to the Northwest corner of a parcel of land conveyed by George N. Chase and others to Daniel R. Taylor by deed dated May 18, 1875, and recorded in Volume 245, Page 307, of Cuyahoga County Records, said corner being in the Southerly line of a 12-foot private alley; thence North 56 degrees East along the Southerly line of said private alley 46 feet 11½ inches to the Westerly line of East 6th Street; thence South

34 degrees 52' East along the Westerly line of East 6th Street 134 feet 3 inches to the place of beginning, be the same more or less, but subject to all legal highways.

(2) Also the right to the use of the 12 foot alley adjoining the above described premises on the North as reserved for the benefit of Daniel R. Taylor, his heirs and assigns, in the deed from George N. Chase and others to George Freeman and Henry Nottingham, dated May 18, 1875, and recorded in Volume 252, Page 62 of Cuyahoga County Records and conveyed by Daniel R. Taylor to Roberta E. J. Bulkley and others by deed dated January 28, 1911, and recorded in Volume 1300, Page 245, of Cuyahoga County Records.

(3) Also the right to the use of so much of the 12-foot common alleyway created in the agreement between Liberty E. Holden and Delia E. Holden, husband and wife, and C. G. King and others, by Agreement dated January 11, 1889, and recorded in Volume 434, Page 622, of Cuyahoga County Records, as lies Westerly of the Westerly line of the above described premises, and subject to the right of the owners of the premises adjoining the above described premises on the west to the use of so much of said alleyway as lies Easterly of the Westerly line of the above described premises,

together with all and singular the easements, rights of way, uses, privileges, improvements, hereditaments and appurtenances and other rights in any way appertaining or useful to or connected with said premises or the buildings and improvements at any time located thereon, or the maintenance, use, enjoyment, occupation or operation thereof.

Said premises (hereinafter sometimes referred to as the "Trust Estate") are subject to a certain Indenture of Lease by and between the Trustee, as Lessor, and The Fidelity Mortgage Company, a corporation organized

and doing business under the laws of the State of Ohio, as Lessee (hereinafter sometimes referred to as "Lessee"), dated as of July 1, 1925, and filed in the office of the Recorder of Cuyahoga County, Ohio, on ....., 1925, as instrument No. ..... (said Indenture of Lease be ; hereinafter sometimes referred to as the "Lease"), to which Lease and the record thereof reference is hereby made for all the terms and conditions thereof, which Lease, among other things, provides in substance as follows:

(a) The term of said Lease is from July 1, 1925, to midnight June 30, 2024, renewable for further terms of ninety-nine (99) years each, forever.

(b) The Lessee agrees to pay to the Lessor, as rental for said premises, for the first fifteen (15) years of said term, beginning July 1, 1925, and ending June 30, 1940, the sum of Fifty-seven Thousand Seven Hundred Fifty Dollars ($57,750.00) per annum, payable in equal quarter-annual installments of Fourteen Thousand Four Hundred Thirty-seven and 50/100 Dollars ($14,437.50) each, in advance, on January 1, April 1, July 1, and October 1 in each of said first fifteen (15) years, beginning July 1, 1925; and for the remaining eighty-four (84) years of said term, beginning July 1, 1940, and for and during any renewal of said term, so long as said Lease shall continue in force, the sum of Sixty-six Thousand Nine Hundred Dollars ($66,900.00) per annum, payable in equal quarter-annual installments of Sixteen Thousand Seven Hundred Twenty-five Dollars ($16,725.00) each, in advance, on January 1, April 1, July 1, and October 1 in each year, plus compensation to the Trustee, for its ordinary serv-

ices in the collection and distribution of the rentals and the general management of the Trust Estate, at the rate of Six Hundred Dollars ($600.00) per annum, for said first fifteen (15) years, and at the rate of Seven Hundred Dollars ($700.00) per annum, for the remaining years of said Lease. The Lessee also covenants to pay all taxes, assessments, levies and public charges of every kind and character which are, or may be, levied or assessed upon the leased premises or any improvements thereon, and also any and all compensation (to the extent that the aforesaid sums of $600.00 per annum and $700.00 per annum, respectively, shall be insufficient to pay said compensation), charges, costs and expenses of the Trustee under this Declaration, and certain other amounts, all as provided in the Lease.

ARTICLE II.

The equitable ownership and beneficial interest in the Trust Estate is divided into ten hundred and fifty (1050) indivisible equal shares, which shares shall be represented by Certificates of Equitable Ownership, said Certificates being referred to and designated as "Land Trust Certificates," said Certificates varying only as to the respective numbers, names of the respective Beneficiaries, and the amount of the equitable interest evidenced by the number of shares represented by the Certificates, and being in substantially the following form, to-wit;

(See Exhibit 7, pages 75 to 82, for form of certificate.)

In case any Land Trust Certificate issued hereunder shall become mutilated or be destroyed, stolen or lost, the Trustee may thereafter in its discretion issue in lieu

thereof a new Certificate representing the interest represented by such mutilated, destroyed, stolen or lost Certificate, in exchange and substitution for the Certificate mutilated, upon cancellation thereof, or in lieu of and in exchange and substitution for the Certificate destroyed, stolen or lost, upon the registered holder's filing with the Trustee evidence satisfactory to the Trustee that such Certificate was destroyed, stolen or lost, and of such holder's ownership thereof, and furnishing the Trustee with indemnity satisfactory to it and for the benefit of all interested parties.

ARTICLE III.

The Trustee agrees that, after paying the compensation of the Trustee provided to be paid in Article XV hereof, and subject to the provisions of the Declaration, it will distribute among the beneficiaries in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all the net proceeds which may be received by it under the terms of the Lease up to a total of Twenty-seven and 50/100 Dollars ($27.50) per half-year, dating from July 1, 1925, in respect to each one/one-thousand-and-fiftieth (1/1050th) fractional share of the equitable ownership and beneficial interest in the Trust Estate as represented by Certificates actually outstanding, such distribution to be made semi-annually on the first (1st) day of January and the first (1st) day of July in each year, commencing January 1, 1926, and such payments shall be made by check at par in Cleveland, Ohio, exchange, mailed to the holders of Certificates as registered on the Trustee's transfer books as of the twentieth (20th) day of the

month next preceding the date of such distribution, at their respective addresses as registered on said books. Any such funds not collected by such certificate holders shall be held by the Trustee, without interest, to the credit of such holders.

ARTICLE IV.

All amounts received by the Trustee from the Lessee under the provisions of Article II of the Lease, in excess of the amount required to compensate the Trustee for its ordinary services in the collection and distribution of the rents, as provided in Article XV hereof, and the amount required to distribute Twenty-seven and 50/100 Dollars ($27.50) per half-year, dating from July 1, 1925, for and in respect to each one/one-thousand-and-fiftieth (1/1050th) fractional share interest then outstanding, as provided in Article III hereof, and all net amounts received by the Trustee as such Lessor as compensation for the appropriation to public use of any part of the Trust Estate, shall be held, used and disposed of by the Trustee for and in the order following:

(1) Payment of any additional compensation of the Trustee, as fixed by Article XV hereof, the expenses of administering this trust, any taxes, charges, assessments and any and all amounts which the Trustee, as Lessor under said Lease, is authorized or permitted to pay for and on behalf of the Lessee for the protection of the Trust Estate free from lien, charge or encumbrance of any kind or character whatsoever.

(2) Purchase by the Trustee of Land Trust Certificates upon voluntary tenders thereof or by call, if request be made therefor by the Lessee, all as hereinafter provided in this Article IV.

(3) Distribution to the holders of the Certificates as provided in Article IX hereof.

Whenever there shall be in the hands of the Trustee Two Thousand Fifty Dollars ($2,050.00), or more, applicable to the purchase by the Trustee of Land Trust Certificates under (2) above, such money may be applied by the Trustee to the voluntary purchase of Land Trust Certificates obtainable upon tenders to it at prices not exceeding the call purchase price thereof, namely, One Thousand Twenty-five Dollars ($1,025.00) for each one/one-thousand-and-fiftieth (1/1050th) fractional share interest so purchased, as provided in Article V hereof, and if not so obtainable, to the call purchase of Certificates, on and after July 1, 1940, as hereinafter provided. The Trustee may purchase Certificates for the purpose and at not exceeding the prices aforesaid, at public or private sale, without the necessity of advertising and in such manner as it may deem proper.

On and after July 1, 1940, whenever there shall be in the hands of the Trustee Two Thousand Fifty Dollars ($2,050.00), or more, applicable to the purchase by the Trustee of Trust Certificates under (2) above, not exhausted in the voluntary purchase of Certificates within ten (10) days after such sum of Two Thousand Fifty Dollars ($2,050.00) or more shall be so available, the Trustee shall, but only upon the written request of the Lessee, devote such funds to the purchase of Certificates by call as follows:

The Trustee or one of its officers shall determine by lot, according to its or his absolute discretion, the serial numbers of Certificates evidencing equitable interests to be purchased up to the amount as specified in the request from the Lessee, and shall thereupon give to the registered holders of the Certificates so designated not less

than fifteen (15) days' written notice, mailed first class postage paid, to such holders at their respective addresses, appearing on the transfer books of the Trustee, of such call purchase of the equitable interests evidenced by the Certificates so designated, and the date fixed for such purchase, and after the date so designated for the purchase of such Certificates, the holders of such Certificates shall be entitled, in respect to each one/one-thousand-and-fiftieth (1/1050th) interest so called for purchase, only to the amount in the hands of the Trustee for such purchase of such Certificates, and shall have no other or further interest in the Trust Estate in respect to each one/one-thousand-and-fiftieth (1/1050th) interest so called for purchase, and on presentation of such Certificates in accordance with such notice at the principal office of the Trustee, the holders of such Certificates so purchased shall be entitled to receive, in respect to each one/one-thousand-and-fiftieth (1/1050th) interest so called for purchase, such call purchase price and no more. Upon call purchase of any of said Certificates and notice, as aforesaid, the holders of the Certificates so called will deliver the same to the Trustee, duly assigned and acknowledged as provided on said Certificates. The Trustee shall issue new Certificates evidencing the equitable ownership in the Trust Estate for the amount of such interest represented by the Certificates so surrendered, less each one/one-thousand-and-fiftieth (1/1050th) interest so called for purchase.

ARTICLE V.

Each one/one-thousand-and-fiftieth (1/1050th) fractional share represented by Certificates issued hereunder

is subject to purchase by call, upon the request of the Lessee, as provided in Article IV hereof, on and after July 1, 1940, at One Thousand Twenty-five Dollars ($1,025.00) per share, plus an amount equal to the proportionate part of the minimum distribution of Fifty-five Dollars ($55.00) per annum for and in respect to each one/one-thousand-and-fiftieth (1/1050th) fractional share, as provided in Article III hereof, computed from the date of the last distribution to date of purchase.

ARTICLE VI.

As provided in the Lease, the Lessee, if not in default in the performance or observance of any of the covenants and conditions of the Lease, has the option to purchase the entire property comprising the Trust Estate, at any time during the continuance of the Lease, at the price of One Million One Hundred Fifteen Thousand Dollars ($1,115,000.00), plus accrued rental to date of purchase, plus all unpaid compensation, expenses, and/or charges of the Trustee and a reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, provided, that, at the time of any such purchase, the Lessee shall be credited on the purchase price with One Thousand Fifty Dollars ($1,050.00) for each one fractional share of beneficial interest theretofore purchased by the Trustee, as provided in Article IV hereof, and also with all amounts then in the hands of the Trustee paid to it under the provisions of Article II of the Lease, which shall not have been theretofore distributed or disposed of under the provisions of this Declaration,—it

being the intention hereof that in no event shall the net amount received by the Trustee from the Lessee upon any purchase by the Lessee of the property comprising the Trust Estate, yield less than One Thousand Fifty Dollars ($1,050.00) for and in respect to each one/one-thousand-and-fiftieth (1/1050th) fractional share at the time actually outstanding, plus an amount equal to the proportionate part of the minimum distribution of Fifty-five Dollars ($55.00) per annum, for and in respect to each such fractional share, as provided in Article III hereof, computed from the date of the last distribution to date of purchase of said property by the Lessee.

In the event that the Lessee exercises said option to purchase, the Trustee is fully authorized to complete such sale, full power and authority being hereby vested in it to execute all conveyances, assignments and/or other transfers of the property sold as may be necessary or proper to convey title thereto, without securing any consent from the Beneficiaries.

ARTICLE VII.

Upon the exercise by the Lessee of the option to purchase the leased premises, or upon sale by the Trustee of the entire property comprised in the Trust Estate, pursuant to and because of default by the Lessee in any of the provisions of the Lease as provided in Article X hereof, the Trustee upon receipt of the option price or the sale price, as the case may be, after deducting all necessary expenses, including a reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net

proceeds thereof, shall distribute the net proceeds among the Beneficiaries holding outstanding Certificates, in accordance with the respective interests held by them as evidenced by their several Certificates and upon their surrender thereof. Notice of any such distribution shall be given by registered mail, mailed to the respective Beneficiaries at their several addresses appearing on the transfer books of the Trustee. If after notice has been given as aforesaid, the holder or holders of any outstanding Certificates shall fail or neglect to present the same at the time and place in said notice specified, the Trustee shall place to the credit of each outstanding Certificate the distributive share to which its holder is entitled, and shall be subject to no further liability and under no further duty to the Beneficiary holding the same under the trusts created by this instrument, except to pay to said holder such distributive share upon demand and the surrender of said Certificate, nor shall it be required to pay interest upon any fund so credited.

ARTICLE VIII.

All shares of beneficial interest in the Trust Estate represented by Certificates purchased by the Trustee, voluntarily or by call, as provided in Article IV hereof, shall be deemed to have been purchased for and on behalf of the holders of the shares not so purchased and represented by Certificates still outstanding, unless and until the Lessee under the Lease shall have exercised its option to purchase the entire Trust Estate as provided in the Lease and as referred to in Article VI hereof, and from and after the exercise of such option by the Lessee and

payment to the Trustee of the option price, said shares so purchased shall be deemed to have been purchased for and on behalf of the Lessee.

From and after the purchase of any of said shares as aforesaid, no further distribution of any kind shall be made by the Trustee in respect to the shares so purchased.

On the purchase of any such shares, the Trustee shall endorse upon the Certificates representing the shares so purchased, a legend substantially as follows:

> "...../1050ths of the equitable ownership and beneficial interest in the property described in the Declaration referred to in this Certificate, represented by this Certificate, have been purchased in pursuance of the provisions of the Declaration"

and when less than the entire interest of the Certificate is purchased:

> "and a new Certificate has been issued for the remaining...../1050ths represented by this Certificate but not purchased"

and the Trustee shall thereafter retain such Certificates.

Notwithstanding that fractional share interests purchased as aforesaid shall not be deemed to be outstanding, the remaining and outstanding fractional share interests shall continue to be designated as whole or aliquot shares on the basis of a total of one thousand and fifty (1,050) shares.

ARTICLE IX.

On July 1, 1940, and at the expiration of each one-year period thereafter, the Trustee shall distribute among the Beneficiaries in proportion to their respective interests as evidenced by the Land Trust Certificates outstanding,

any and all amounts at the time in the hands of the Trustee paid to it under the provisions of Article II of the Lease, which have not been theretofore distributed, disposed of or held for the call purchase of Certificates which have been called prior thereto under the provisions of Article III and IV of this Declaration; provided, however, that the Trustee shall not so distribute any amount less than the call purchase price of two/one-thousand-and-fiftieths (2/1050ths) beneficial interests.

ARTICLE X.

In the event that the Lessee shall make default in any of the provisions of the Lease so that it shall have become necessary, or, in the opinion of the Trustee advisable, for the Trustee, as Lessor, to terminate the same, the Trustee shall give not less than fourteen (14) days' notice thereof to the Beneficiaries by registered letter mailed to their last addresses, as furnished by them to the Trustee, such notice to be deemed commenced with the mailing of said letters, and shall request therein advice as to whether the property should be offered for sale, or whether another lease thereof should be made, if possible. If the holders of not less than a majority in interest of the outstanding Certificates shall, within fourteen (14) days after the expiration of the period of notice above provided, notify the Trustee, in writing, of their agreement upon the course to be taken, the Trustee shall endeavor in its discretion to comply with their wishes. In the event of the failure or neglect of the holders of not less than a majority in interest of the outstanding Certificates to express their wishes within the period above

provided, or, in the event the Trustee shall find, after making reasonable efforts, that it is impracticable to comply with such expressed wish of said Certificate holders, it shall have full authority to take such action with respect to selling, leasing for ninety-nine (99) years renewable forever, or for lesser terms, managing, operating or otherwise disposing of said property as it may deem advisable and for the best interest of said Certificate holders.

In the event that upon a default on the part of the Lessee under the terms of said Lease, the Trustee shall not deem it advisable to sell the Trust Estate, but shall enter into a new lease or leases of the Trust Estate, then the Trustee, after deducting its expenses and reasonable compensation for its services hereunder, shall distribute among the Beneficiaries, in proportion to their respective interests as evidenced by Land Trust Certificates issued hereunder and at the time outstanding, all of the net proceeds which may be received by it under the terms of such new lease or leases, such distribution to be made semi-annually on the first (1st) day of January and the first (1st) day of July in each year, and such payment shall be made by check at par in Cleveland, Ohio, exchange, mailed to the holders of Certificates at their respective addresses as registered on the Trustee's transfer books as of the twentieth day of the month preceding such distribution.

Upon the sale of the Trust Estate in pursuance of the provisions of this Article, the net proceeds of such sale, after deducting all expenses of the sale and repaying any advances which may have been made by the Trustee, or

indebtedness which the Trustee may have incurred in connection with the Trust Estate, shall be distributed by the Trustee among the holders of the outstanding Certificates in the manner provided in Article VII hereof. Unless terminated by sale of the Trust Estate this trust shall continue during the existence of the Lease and any renewals thereof, or any lease or leases made by the Trustee, under the terms hereof.

ARTICLE XI.

No Beneficiary as such shall have any legal title to the trust property itself, real or personal, held by the Trustee, his interest being equitable only, and he shall have no right to call for any partition of the Trust Estate during the continuance of the trust, any and all such rights being waived by the Beneficiaries, by acceptance of the Land Trust Certificates. No transfer by operation of law of the interests of a Beneficiary during the continuance of this trust shall operate to terminate the trust, nor shall it entitle the legal representative of a deceased Beneficiary to an accounting or to take any action in the courts or otherwise against the Trust Estate or the Trustee.

Notwithstanding any transfer by operation of law of the interest, or any part thereof, of a Beneficiary as aforesaid, the Trustee shall be fully protected in paying and accounting to the personal representatives of any deceased Beneficiary with respect to all matters arising under this trust, and the rights of any such transferee shall accrue and be enforceable against and be binding upon such personal representatives and not against or upon the Trustee or the Trust Estate until such trans-

ferees shall have established to the satisfaction of the Trustee their succession to such interests and surrendered the Certificate or Certificates representing the same to the Trustee for transfer.

ARTICLE XII.

No assessment shall ever be made upon the Beneficiaries, and the Trustee shall have no power to bind the Beneficiaries personally, and in every written contract made by the Trustee reference shall be made to this instrument, and the person or corporation contracting with the Trustee shall look only to the funds and property of the trust for payment under such contract, or for the payment of any debt, note, judgment or decree, or of any money that may otherwise become due and payable by reason of the failure on the part of the Trustee to perform such contract in whole or in part, or for any other cause, and neither the Trustee nor the Beneficiaries, present or future, shall, in any event, be personally liable therefor.

ARTICLE XIII.

The Trustee shall keep a register of the names and interests of the Beneficiaries hereunder, and proper transfer books, and books of account showing the receipts and disbursements of the Trust Estate. Such books of account, but not the register of names and interests or transfer books, shall at all reasonable times be open to the inspection of any Beneficiary or his personal representatives.

On the twentieth (20th) days of June and December of each year, the Trustee shall prepare and forward to

Geo. W. York & Co., Inc., of Cleveland, Ohio, a list of the owners of Land Trust Certificates and the number of shares held by such owners as shown on the Trustee's books.

Land Trust Certificates may be assigned and transferred in full shares of one/one-thousand-and-fiftieth (1/1050th) each, but not in fractions thereof, by the holder or holders thereof, in person or by attorney duly authorized, and upon presentation to the Trustee of any such Certificate, duly executed for transfer, and the payment of any stamp and/or other taxes payable upon such transfer, the Trustee will execute and deliver to such transferee, a new Land Trust Certificate or Certificates representing the number of shares of equitable ownership in the Trust Estate so transferred, and such transferee shall, by accepting such Certificates so assigned to him, or any new Certificate issued in place thereof, forthwith become a party to this Declaration and be bound hereby and entitled to all of the rights of a Beneficiary hereunder; but no assignment or transfer of a Land Trust Certificate or the equitable interest represented thereby or any interest therein shall be valid or binding upon the Trustee or upon the holder of such Certificate or any new Certificate or Certificates issued in place thereof, until the Certificate so assigned or transferred or evidencing the equitable ownership or interest therein, so assigned or transferred, shall be surrendered to the Trustee and a new Certificate or Certificates issued in place thereof as herein provided for, and notation of such transfer made upon the books of the Trustee.

ARTICLE XIV.

The Trustee does not warrant its title as owner of the premises hereinbefore described as the Trust Estate, or make any representations with reference thereto, nor does it warrant the validity of the Lease, nor of any other Lease of the said premises which may hereafter be made, nor guarantee the performance of the covenants thereof by the Lessee or any Lessees thereunder. It undertakes only to exercise ordinary care in collecting the rentals derived from said premises and in distributing among the Beneficiaries the net proceeds derived therefrom, or in carrying out any sale of said premises and distributing the proceeds among the Beneficiaries, as the case may be.

The Trustee shall have the exclusive right to manage and control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligations to the Beneficiaries other than such as are expressly assumed hereunder.

The Trustee shall likewise have full and unrestricted power and authority to enter into, execute and deliver any agreements and instruments in writing modifying, amending or supplementing the Lease, if and when, in the sole and absolute discretion of the Trustee or Lessor, it shall appear wise, expedient or proper so to do.

The Trustee shall have full power to compromise and settle claims either in contract or tort made against it or against the proceeds derived from the Trust Estate.

The Trustee shall be protected in acting upon any notice, request, consent, affidavit, certificate, assignment, note or other paper or document believed by it to be genuine and to be signed by the proper party.

The Midland Bank, or any other corporation or any individual that may at any time be Trustee hereunder may own or acquire Land Trust Certificates to the same extent and with the same effect as if any such corporation or individual were not Trustee hereunder.

The Trustee shall be entitled to indemnity from the Trust Estate for any personal liability by it incurred in the administration of this trust, except such as may arise from its personal and wilful default.

The Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of this trust so long as it acts in good faith; nor shall it be personally liable for the acts or omissions of any officer, agent, servant or employe selected or appointed by or acting for it (reasonable care having been used in their selection), and it shall not be obliged to give any bond to secure the due performance of this trust by it.

The Trustee shall have the power, in the event that it should become necessary for it to provide funds to meet a temporary exigency arising in connection with the management of the Trust Estate, or to enable it to comply with any of the provisions of said Lease to The Fidelity Mortgage Company, to make advances at reasonable or customary rates of interest or borrow money and give notes or other security therefor binding the assets of the trust, but not the Trustee or Beneficiaries personally.

Any such advances or indebtedness shall be paid by the Trustee prior to and ahead of any other disbursement made by it.

The Trustee may advise with legal counsel, and any action under this Trust Agreement taken or suffered in good faith by the Trustee in accordance with the opinion of such counsel, shall be conclusive on the Beneficiaries, and the Trustee shall be fully protected in respect thereof.

Whenever in this instrument or in any Land Trust Certificate issued hereunder the Trustee is obligated to pay or distribute any sum of money to the holders of such Land Trust Certificates, it is understood that all such obligations are undertaken by it in its trust capacity only and not personally, and that such payments and distributions are to be made only out of such funds as the Trustee has in its hands available therefor.

ARTICLE XV.

The compensation of the Trustee for its ordinary services in the collection and distribution of rents and the general management of the Trust Estate shall be at the rate of Six Hundred Dollars ($600.00) per annum for the first fifteen (15) years of the term of the Lease and at the rate of Seven Hundred Dollars ($700.00) per annum for the remaining years,—to be deducted from the gross income of the Trust Estate, and in the event that it should become necessary for the Trustee at any time to render extraordinary services in the carrying out of any of the provisions of the trust created by this Declaration, it shall be entitled to receive an additional reasonable compensation therefor, and such compensation, together with

any and all expenses, charges or liabilities made, incurred or discharged by the Trustee under the terms and conditions of this Declaration, shall be a lien against and paid from the Trust Estate and/or the income derived therefrom.

ARTICLE XVI.

In the event that the Trustee or any successor hereafter appointed shall desire to relinquish the trust evidenced by this Agreement or that the holders of not less than three-fourths in interest of the Certificates shall for any reason desire to change the Trustee, the Trustee or the holders of not less than three-fourths in interest of the Certificates, as the case may be, shall give four (4) weeks' notice thereof to all the Beneficiaries, either by registered letter sent to their last addresses furnished by them to the Trustee, such notice to be deemed to commence with the mailing of said letter, or by publication once a week for four (4) weeks in one newspaper published and of general circulation in the City of Cleveland, Ohio. If the holders of not less than three-fourths in interest of the Certificates shall, within two (2) weeks after the expiration of the period of notice above provided, request the Trustee in writing to convey the Trust Estate to a specified Trustee who is willing to accept the trust, the Trustee shall, upon the making of such conveyance and upon accounting for all funds which have previously come into its possession, be discharged from further liability. In the event of the failure or neglect of the holders of not less than three-fourths (3/4ths) in interest of the Certificates to express their choice of a successor within the period above provided, the Trustee

may either choose a successor believed by it to be responsible or may request the Common Pleas Court of Cuyahoga County, Ohio, to do so. Upon conveying the Trust Estate to a successor trustee appointed by either of the methods above provided and upon accounting for all funds which have previously come into its possession, and surrendering all Certificates, papers and documents held by it in connection with said Trust, the Trustee shall be discharged from further liability.

In the event of the consolidation or merger of The Midland Bank, or of any successor Trustee, with any other corporation, such consolidated corporation shall succeed to the title and rights of the original Trustee, subject to the terms and conditions of this Trust Agreement. The purchase of the assets and the assumption of the liabilities of the Trustee shall be treated as a merger or consolidation, as provided for in this Article.

ARTICLE XVII.

The term "Trustee" shall be deemed to include The Midland Bank, Trustee, or any successor which may hereafter be appointed under any of the provisions of this instrument, and any such successor Trustee shall be vested with all the titles, discretion and immunities which are herein vested in the Trustee herein named.

ARTICLE XVIII.

By the acceptance of any Certificate issued hereunder, the original or any successive holder shall be deemed to assent to all of the provisions contained in this Trust Agreement.

ARTICLE XIX.

Wherever in this Declaration reference is made to the "outstanding Certificates," or "the holders in interest of the Certificates," or equivalent designations, the same shall be deemed to mean and apply to the holders of the Certificates outstanding and shall not include any Certificates or shares acquired by the Trustee through purchase, voluntary or by call, or called for purchase, under the provisions of Article IV hereof.

IN WITNESS WHEREOF, the said THE MIDLAND BANK, has caused these presents to be signed in its corporate name by its President or Vice-President and its corporate seal to be hereunto affixed and attested by its Trust Officer or Assistant Trust Officer, as of July 1, A. D. 1925, in triplicate.

(Duly executed and acknowledged.)

EXHIBIT "21."

ADVANCE PAYMENT TAX RECEIPT—1932.

No. 35425

Make checks payable to EDGAR FRIEDLANDER, County Treasurer.
For information see ROBERT HEUCK, County Auditor.
All Valuations and Tax Amounts subject to reassessment when return is audited.

Date Issued 3/14

GENERAL PERSONAL PROPERTY TAXING DISTRICT	Rate of Tax	Taxpayer's Listed Valuation	Total Estimated Tax	Estimated Advance Payment	Total Paid
CINCINNATI					$414.74
Classified Personal Property ...					
Investment at Income Yield ...	5%	17312	86560		
Investment Unproductive	.2%	7135	1427		
Deposits Outside Ohio	.2%				
Credits	.3%	20381	6114		
Money and Other Taxable Intang.	.3%				
Total Estimated Tax			94101	47051	

Tendered and accepted 3/14/32. A. C. C.

Issued to—Max Senior
31 Electric Bl
Cincinnati

When checks given for taxes are not paid on presentation at bank, and other satisfactory payment is not made on or before April 10, 1932, the Return is not deemed filed and penalty assessment for failure to file will be imposed, receipts given will be considered void.

[fol. 141] IN COURT OF COMMON PLEAS OF HAMILTON COUNTY

A-31247

MEMORANDUM OPINION

RYAN, J.:

This proceeding is instituted for the purpose of determining the power of the State of Ohio, under the new intangible tax law, to tax "equitable interests divided into shares, evidenced by transferable certificates," according to the income yield as defined in the statute.

The plaintiff alleges that he is now, and was on January 1, 1932, the owner of certain equitable interests in land evidenced by transferable certificates of ownership described in the petition; that rental was paid to the plaintiff as such equitable owner during the year 1931, and that the plaintiff has duly filed with the County Auditor his individual tax return of taxable property for 1932 on the official forms prescribed by the Tax Commission of Ohio, and has paid to the County Treasurer one-half of the tax due in accordance with said return.

The plaintiff further alleges that he has fully listed in said return the taxable property required to be listed, including the rental received from the equitable interests in [fol. 142] the land referred to in said certificates, but has not included the amount of such rental as income yield subject to tax.

Plaintiff says that General Code of Ohio, Section 5323, purports to except from taxation as investments "interests in land and rent and royalties derived therefrom other than equitable interests divided into shares evidenced by transferable certificates," that is, said section purports to except from taxation as investments interests in land, legal and equitable, and rents derived therefrom when not evidenced by transferable certificates, but does not except from taxation as investments equitable interests in land and rents derived therefrom when evidenced by transferable certificates.

Plaintiff says that the assessing and collecting of taxes on plaintiff's said equitable interests in land evidenced by transferable certificates, when all other equitable interests

in land not evidenced are exempted therefrom, is an arbitrary and unreasonable discrimination without warrant of law, and amounts to a taking of private property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the law, in violation of plaintiff's rights under the Constitution of the United States and of Article XIV, Section I of the amendments thereto.

Plaintiff further says that the lands in which plaintiff has such equitable ownership, as aforesaid, have been assessed in the names of the legal owners or lessees thereof according to value, without any deduction or diminution by reason of plaintiff's interests in said lands. Plaintiff says that the [fol. 143] levying and collecting of taxes on his equitable interests in the lands so assessed at full value in the names of the owners or lessees constitutes double and unequal taxation in violation of the Constitution of Ohio and Article XII, Sections 2 and 5 thereof. Plaintiff further says that equitable interests in land whether evidenced by transferable certificates or not, constitute interests in real estate within the purview of Section 5322 of the General Code of Ohio, defining real property and land; and that Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land other than by uniform rule is contrary to Article XII, Section 2, of the Constitution of Ohio, which provides that "land and improvements thereon shall be taxed by uniform rule according to value."

Plaintiff further says that the levying and collecting of taxes on plaintiff's equitable interests in real estate situated outside of the State of Ohio, to-wit, the Clark-Randolph Building Site in Chicago, Illinois, the Insurance Exchange Building in Boston, Massachusetts, and the City National Bank Building in Omaha, Nebraska, is an attempt to levy and collect taxes on property wholly outside the State of Ohio, is beyond the taxing power of the State of Ohio and amounts to a taking of private property without due process of law in violation of the Constitution of the State of Ohio, and Article I, Section 16 thereof, and of the Constitution of the United States and Article XIV, Section I of the amendments thereof.

Defendants intend to assess, threaten to assess and will, unless restrained by order of this court, assess the Ohio [fol. 144] intangible property tax on plaintiff's said equitable interests in land, and will attempt to collect said tax,

to the irreparable injury of plaintiff, as to which plaintiff is without adequate remedy at law.

Wherefore, plaintiff prays that the court declare that General Code of Ohio, Section 5323, insofar as it purports to tax equitable interests in land, and rents derived therefrom, only when such equitable interests are evidenced by transferable certificates, to be illegal, unconstitutional and void, and to restrain the assessment and collection of the tax therein provided for.

Answering the petition of the plaintiff, the defendants, constituting the Tax Commission of Ohio, deny generally the allegations of the petition, and further deny that said allegations are sufficient to give the court any jurisdiction as to the granting of the relief prayed for.

The County Auditor and Treasurer, by joint answer, admit that the plaintiff is and was on January 1, 1932, a resident of Cincinnati, Hamilton County, Ohio, and that on said date he was the owner of the land trust certificates set out in the petition, and that as the owner of such certificates he received an income therefrom during the year 1931, as alleged in the petition. These defendants further admit that unless otherwise restrained they will assess and proceed to collect the taxes on said land trust certificates in accordance with the tax laws of the State of Ohio. Defendants further answer by way of general denial except as to facts admitted and pray for dismissal of plaintiff's petition.

[fol. 145] The plaintiff contends:

First. That the land trust certificates are merely evidence of an equitable interest in real estate, and that as to the land trust certificates which describe real estate located without the state, the State of Ohio has no right to tax said property since by so doing it would be a tax on real estate or tangible property having no situs within the state.

Second. As to the land trust certificates evidencing an interest in real estate within the state, the state has no power to tax unless the real estate described in said certificates be not taxed.

Third. The section in question provides for the levying and collection of a tax on interests in real estate which are divided into shares when it exempts interests not divided into shares evidenced by transferable certificates,

and for that reason the tax is an arbitrary and unreasonable discrimination.

The defendants contend:

First. That the land trust certificates described in plaintiff's petition are not evidence of an equitable interest in real estate, but in and of themselves represent intangible property subject to the tax; and

Second. That the taxation of equitable interests divided into shares evidenced by transferable certificates of interests in land, is a reasonable classification of property under the Constitution of Ohio, and does not violate the provisions of either the State or Federal Constitution.

An examination of the facts as to the creation of the interest or rights of the petitioner in the property comprising the trust estate is necessary to the determination [fol. 146] of the question of its taxability. The nature of all the land trust certificates described in the petition, with the exception of the Lincoln Inn Court ground rent, are substantially the same:

For example, The Clark-Randolph Building Site trust. William G. Pohl, Cecilia Pohl, his wife, were the owners of the premises known as The Clark-Randolph Building Site, being Lots 5 and 6 in Block 35 in the original town of Chicago, Illinois. On March 13, 1928, William G. Pohl and Cecilia Pohl, his wife, conveyed said premises to The Chicago Title & Trust Company of Chicago, Illinois, subject to a lease by which the Pohls had demised said premises to one Leo M. Sage, for a term of ninety-nine years renewable at the option of the lessee for one additional like term, in consideration of the lessee's promise, inter alia, to pay a stipulated rental. Simultaneously with the execution and delivery of the deed from William G. Pohl and wife to said Trustee, the Trust Company and Pohl, acting for himself and such persons, partnerships, associations and/or corporations as might thereafter become parties thereto by acceptance of certificates of equitable ownership, entered into an agreement and declaration of trust by which the Trust Company, as Trustee, agreed to hold the title to the Clark-Randolph Building Site in trust for the use and benefit of Pohl and all future holders of certificates of equitable ownership, it being provided that all

such certificates should be issued to and in the name of William G. Pohl in consideration of the conveyance to such Trustee. Under this arrangement a land trust certificate [fol. 147] for 3250 shares in the trust was issued, this evidenced the entire equitable ownership of said trust estate.

Subsequently, the plaintiff herein acquired a 5/3250ths of the equitable ownership and beneficial interest in the property constituting the trust estate held by the Trust Company. The land trust certificate does not fully set forth the terms and conditions of the trust, but by reference the declaration of trust is made a part of such certificate. The pertinent parts of the declaration of trust are as follows:

"Article I

"The Trustee hereby agrees that it will hold as Trustee upon the trusts hereinafter set forth, for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called 'Land Trust Certificates'), the title acquired by the Trustee by a certain deed dated as of March 1, 1928, but in fact executed and delivered simultaneously herewith, from one William G. Pohl of the City of Chicago, County of Cook, and State of Illinois, and Cecilia Louise Pohl, his wife, and filed for record in the office of the Recorder of Cook County, Illinois, on the — day of March, 1928, as Document No. 9956060, to the following described premises situated in the City of Chicago, County of Cook, and State of Illinois, and bounded and described as follows, to-wit:

Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original town of Chicago.

The interest of the Trustee in said premises is hereinafter sometimes referred to as the 'trust estate'. • • •

"Article II

"The equitable ownership and beneficial interest in the Trust Estate is divided into three thousand two hundred [fol. 148] and fifty (3,250) indivisible equal shares (each share representing 1/3250ths part of the equitable ownership of said trust estate) which shares shall be represented by Certificates of Equitable Ownership, said Certificates being referred to and designated as 'Land Trust Certificates', varying only as to the respective numbers, names

of the respective Beneficiaries, and the number of shares represented by the Certificates."

* * * * * * *

"The Trustee agrees that on the first days of June and December of each year, commencing June 1, 1928, it will pay to the registered holder of this Certificate, as registered on the Trustee's transfer books as of the 25th day of the month just preceding the month in which such distribution is to be made, said holder's pro rata share of the net proceeds which may be derived by it from the rental of the property described in the Declaration and constituting the Trust Estate, and that upon any sale of said property, either under the option to purchase hereinafter mentioned or otherwise, or a sale at the termination of the trust, it will pay to the registered holder hereof such holder's proportionate share of the net proceeds derived by it from such sale, all in the manner provided in the Declaration."

* * * * * * *

"The holder of this Certificate, by the acceptance hereof, expressly assents to all the terms and conditions of the Declaration and becomes a party thereto as fully to all intents and purposes as if said holder had signed the Declaration.

"Article III

"The Trustee agrees that, after payment of the compensation of the Trustee provided to be paid in Article X hereof, and after payment of (1) the expenses of administering this trust, (2) any taxes, charges, assessments, and [fol. 149] any and all amounts which the Lessor under said Lease is authorized or permitted to pay for and on behalf of the Lessee for the protection of the Trust Estate free from lien, charge or encumbrance of any kind or character whatsoever, (3) any Federal or other income tax or taxes, which under any present or future law, the Trustee may be required to pay or withhold upon the receipt by it of the amounts payable to it under the provisions of said Lease, and/or (4) any other tax, charge, assessment or liability which the Trustee may be required to pay, and subject to the provisions of this Declaration, it will distribute among the beneficiaries (and in such distribution, the shares, if

any, held in the Depreciation Fund shall share ratably with all other outstanding shares) in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all the net proceeds of rentals which may be received by it under the terms of the Lease."

"Article IV

"Upon the exercise of the Lessee of the option to purchase the Trust Estate, the Trustee, upon receipt of the option price after deducting all necessary expenses, including reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, shall distribute the net proceeds among the Beneficiaries holding outstanding certificates (other than certificates in the Depreciation Fund), in accordance with the respective interests held by them as evidenced by their several certificates and upon their surrender thereof."

* * * * * * *

Similar provision is also made for same by the Trustee of the entire property comprising the Trust Estate because of a default by the Lessee, and also upon the sale by the [fol. 150] Trustee of the entire property prior to the termination of the Lease.

"Article VI

"No Beneficiary as such, shall have any legal title to the trust property itself, or any part thereof, real or personal, held by the Trustee, his interest being an equitable estate only, and he shall have no right to call for any partition of the Trust Estate during the continuance of the trust, any and all such rights being waived by the Beneficiaries, by acceptance of the Land Trust Certificates. Neither the death of a Beneficiary nor any transfer by operation of law of the interest of a Beneficiary during the continuance of this trust shall operate to terminate the trust, nor shall it entitle the legal representative of a deceased Beneficiary to an accounting or to take any action in the courts or otherwise against the Trust Estate or the Trustee." * * *

"Article VIII

"• • • Land Trust Certificates and the equitable interest in the trust estate evidenced thereby may be transferred and conveyed in full shares, but not in fractions thereof, by the owner or owners thereof, in person or by attorney duly authorized, and upon presentation to the Trustee of any such Certificate, duly executed for transfer in the form hereinbefore recited conveying the equitable interest evidenced by such Certificate, the Trustee will execute and deliver to such transferee a new Land Trust Certificate or Certificates representing the equitable interest in the Trust Estate so transferred in full shares thereof, but not in fractions thereof, and such transferee shall, by accepting such Certificate (and the equitable interest evidenced thereby) so transferred to him, or any new Certificate issued in place thereof, become a party to the Declaration and be bound thereby and entitled to all the rights thereunder."

[fol. 151] "Article IX

"The Trustee shall have the exclusive right to control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligation to the Beneficiaries other than such as are expressly assumed hereunder."

An examination of the facts as to the creation of the interest or rights of the petitioner in the property comprising the Trust Estate in connection with the Lincoln Inn Court "Certificate of Interest in Ground Rent," discloses that on February 5, 1917, The Conrad Windisch Company was the owner of the premises located at the north-west corner of Main Street and Patterson Alley, in the City of Cincinnati, Hamilton County, Ohio, said premises having a frontage of 76 feet, more or less, on Main Street, and abutting 176 feet, more or less, on Patterson Alley, and being all of the property on which the Lincoln Inn Court Building is located, conveyed said premises to the Title Guaranty and Trust Company. On the same date, The Title Guar-

anty and Trust Company executed a declaration of trust wherein it is provided:

"That it holds and will continue to hold the title to said premises for the use and benefit of the holders of certificates of interest in the ground rent hereinafter referred to."

* * * * * * *

"To collect and receipt for the rental due upon said perpetual lease hereinbefore provided for and after deduct- [fol. 152] ing from the gross rental received the sum of $100.00 per annum from Trustee's compensation, to distribute the balance to the holders of such certificate in proportion to the interest of each."

"Upon the demand of one or more holders of such certificates aggregating $10,000 par value, and the surrender of such certificates to convey to such holders jointly by special warranty deed the proportionate part of the fee simple title to said property to which their certificates may entitle them. After conveyances aggregating $120,000 par have been made, the remaining certificate holders may demand a conveyance."

* * * * * * *

"The value of the trust estate shall be taken and understood to be $127,500 and certificates therefor shall be issued in amounts of 1/1275ths of multiples thereof, and in the event of the exercise of the privilege of purchase reserved in said lease, said Trustee shall distribute to the certificate holders the proportions of said purchase price represented by the certificates held by each.

"Said certificates shall be transferable only on the books of the Trustee upon surrender thereof, and the acceptance of a certificate shall make the person named therein a party to and bound by the terms of this agreement."

"This trust shall continue until the exercise of the privilege of purchase reserved in said lease at which time all certificates must be surrendered to the Trustee, or until the entire property shall have been conveyed pursuant to the provisions of article (5) of this agreement. No Trustee shall be required to give bond and shall be liable only for his or its own acts and no person dealing with the Trustee shall be required to see to the application of any money paid to the trustee.

"When the privilege of purchase reserved in said lease shall be exercised, the Trustee shall forthwith convey said premises to the lessee or his assigns, and the rights of the [fol. 153] certificate holders in said premises shall thereupon cease and determine and be transferred to the proceeds of sale in the hands of the Trustee."

The answers to the several questions presented are dependent upon the determination of the question as to whether equitable interests divided into shares evidenced by certificates are real estate or personal property in the nature of choses in action.

The pertinent provisions of the Constitutions are:

Ohio Const., Art. XII, Section 2:

"Taxation by uniform rule.— • • • No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes. • • • Land and improvements thereon shall be taxed by uniform rule according to value. • • •

Ohio Const., Art. XII, Section 5:

"Levying of taxes and application.—No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

United States Const., Art. XIV, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 154] The sections of the General Code relating to the subject matter of this controversy provide as follows:

"Sec. 5323. 'Investments' Defined.—The term 'investments' as used in this title, includes the following:

• • • • • • •

Annuities, royalties, and other contractural obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, *excepting* (1) patents and copyrights and royalties derived from each, (2) *interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates.* * * *"

General Code Section 5388 provides:

"Sec. 5388. * * * In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield. * * *"

"Sec. 5389. * * * 'Income yield' as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders, of an investment, whether including the taxpayer or not, during such year. * * *"

"Sec. 5322. 'Real Property' and 'Land.' The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained thereon, but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

[fol. 155] In the very able and learned arguments of Counsel, and the exhaustive briefs submitted, every important decision pertinent to the questions presented have been reviewed, but we are unable to find any Ohio adjudication directly in point.

In the early decisions of Avery v. Durfrees, 9 Ohio 145, the Court defines real property as

"The interest which a man has in lands, tenements or hereditaments. If it be such an interest as can be enforced in a Court of law it is a legal interest or estate. If it be

such as can only be enforced in a Court of Chancery it is an equitable interest or estate. But in either case it is real estate or property."

And again in the case of Biggs v. Bickel, 12 O. S. 49, the Court defines real estate as an "interest" in lands, tenements or hereditaments.

Bispham in his work on Equity, discussing equitable titles, says:

"A trust, in its technical sense, is the right enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another. The radical idea of a trust is this separate co-existence of the legal title with the beneficial ownership, or, as it came to be called, the equitable title. The perfect ownership is, as it were, decomposed into its constituent elements of legal title and beneficial interests which are vested in different persons at the same time, • • •"

Again the learned author says:

"The rules for the descent of equitable estates are the same as those which regulate the devolution of legal titles. Equitable interests are within the statute of distributions." • • •

[fol. 156] "Whatever would be the rule of law if it were a legal estate it would be applied in equity to a trust estate."

Coming to a consideration of the nature and status of a Land Trust Certificate, we find the same to be very positively and accurately defined in the opinion of the Attorney General, No. 3640, 1926, O. A. G., page 376, wherein he says:

"• • • The land trust certificate is exactly what its name implies—a certificate evidencing an interest in the equitable ownership of land held in trust, and is, therefore, a real estate investment. It is not in any sense a mortgage, a leasehold bond or note, but is an evidence of actual ownership in whatever property may be trusteed as a basis for the issuance of any particular series or designation of certificates. The certificate is merely an evidence of the holder's simple individual share in the ownership of large parcels of property. As these certificates are merely an

evidence of ownership they have, of course, no par value or other fixed nominal value. Nothing but custom and convenience govern the price at which the certificates are sold and the interest which accrues thereupon. As the land trust certificate is merely an evidence of ownership, there is, of course, no such thing as maturity; and it is merely evidence of equitable ownership of real estate, no personal property taxes are payable thereon."

* * * * * * *

"It is therefore believed that the holders of the land trust certificates authorized under the aforesaid declaration of trust are not required to list them for taxation. You further inquire if it would make any difference if the real estate in question was located outside of Ohio, or the trustee was a nonresident of this State; or if the trustee was a nonresident and the land was also without the State.

[fol. 157] "It is believed that the said statement of changed status would make no difference in our answer as before herein stated.

" 'Therefore, it may be said that in the State where both trustees and cestui que trust reside one tax is all that may be imposed; and if they reside in different states, the tax is imposed where the property is held.' "

In this opinion the Attorney General quotes from the decision of the Court in the case of Morrison v. Manchester, 58 N. H. at 563, wherein the Court says:

"The division of title into legal and equitable parts is not a multiplication of property. * * * The owner of a farm does not pay two taxes, one on his farm and another on his deed, although the deed is property of value as evidence of his title and is protected as property by civil and criminal process * * * and if the testator dividing the equitable title and beneficial interest into four shares gave two shares to his widow and one share to each of his two children, directed the trustee to issue to them certificates as evidence of their respective rights in the trust property, and made the certificates assessable and available as personal property, like certificates of corporate stock, and if this disposition of his property was authorized by law, the united titles of the trustee and widow and children would not be more than the title of the testator."

The above opinion of the Attorney General was quoted and given great weight in the recent case of Narragansett Mutual Fire Insurance Company v. Burnham, decided May 27, 1931, and reported in 154 Atlantic 909, wherein the Court held:

"Land trust certificates not to be 'secured' and therefore not taxable under the statute, but rather a 'muniment of title of equitable interest in real estate.'"

[fol. 158] At page 511, the Court says:

"Certificate holders in trust organizations have for some purposes been held to be partners (Frost v. Thompson, 219 Mass. 360); voluntary associations (Hecht v. Malley, 265 U. S. 144 and pure trusts (Baker v. Commissioner of Corporations, 253 Mass. 130); Rhode Island Hospital Trust Company v. Copeland, 39 R. I. 193). The test to determine to which class a particular trust belongs as applied in the Massachusetts decisions is the measure of control which the certificate holders have over the trustees. If the latter are free from the control of the former in the management of the property the relation between them is that of trustee and cestui que trust, if the certificate holders are associated together in the management of the property and the trustees are simply managing agents then a partnership relation arises. Hecht v. Malley, supra, citing Williams v. Milton, 215 Mass. 1; Frost v. Thompson, supra; Dana v. Treas., 227 Mass. 562; Priestley v. Treas., 230 Mass. 452. For purposes of taxation the nature of the property constituting the trust res may be the determining factor. Dana v. Treas., supra; Baker v. Commissioner of Corporations, supra. In the instant case it is clear that the agreement and declaration of trust created a pure trust. The trust res is real estate. The certificate holders have no control over the trustee, whose power over the trust property is absolute, limited only by the principles of equity applicable to relation of trustee and cestui que trust. Said agreement contains no provision for concerted action on the part of certificate holders other than to give their consent to any change in the declaration of trust made by the trustee. There is no provision for conversion into personal property except in case the option to purchase is exercised by the lessee or the lessee shall be in default of any of the pro-

visions of the lease and in such latter event a sale of the trust property rests entirely in the discretion and judgment of the trustee. The option to purchase may never [fol. 159] be exercised and this provision of the lease does not work a conversion under the law in Ohio. Smith v. Lowenstein, 50 Ohio St. 346. The contention of the respondents that these land trust certificates are taxable as a security under the provisions of Sections 10 and 11, Chapter 59 (Sections 820, 821) G. L. 1923, is untenable. The word 'security' in its legal sense is commonly understood to mean something given or deposited as security for the fulfillment of an obligation. These certificates do not relate to any obligation or promise. The holders have no remedy beyond recourse to the trust property in case they fail to receive the expected return on their investment. In our opinion the land trust certificates owned by the petitioner is not a security within the meaning of the statute but is a muniment of title to an equitable interest in real estate in Ohio."

And at page 512 the Court says:

"Our conclusion is that the Land Trust Certificates owned by the petitioner represents an equitable interest in the real estate in Ohio and is, therefore, not subject to taxation under Sections 10 and 11, Chapter 59 (Sections 820 and 821) G. L. 1923."

See also the case of Bates v. The Decree of the Probate Judge, 160 Atlantic Rep. 22, wherein it says:

"Facts disclosed that, while trust agreement reserved to shareholders in trust right to terminate trust or appoint new trustee, and gave them certain other rights which might be necessary for protection or benefit of shareholders, management of property was within control of trustee at all times, and by trust agreement intended so to be. By terms of trust agreement, trust was to continue until twenty years after death of last survivor of certain named persons and at termination trustee was to sell trust property and divide [fol. 160] net proceeds and all other property of trust among the shareholders in proportion to respective interests."

The Court at page 26 says:

"Our conclusion being that we are bound by the Massachusetts law in determining the question before us, we hold that the Wildes Buildings Trust is a trust and not a partnership, and that the shares under consideration represent an interest in real estate, and that for that reason they are not subject to an inheritance tax in Maine."

In view of the above and the many authorities examined, which the Court for the sake of brevity refrains from reviewing here, this Court is of the opinion that the equitable interests divided into shares evidenced by certificates, are interests in real estate and not personal property in the nature of equitable choses in action. That the land trust certificates are merely evidence of an equitable interest in real estate, and that as to the interest which the land trust certificates describe in real estate located without the State of Ohio, his State has no power to tax since it would be a tax on real estate having no situs within the State.

That the land trust certificate is no more than an evidence of an equitable interest in real estate, a mere muniment of title and no more the subject of taxation under our present law than would be the deed to real estate, and in any event the interest described therein is not subject to taxation in the State of Ohio unless the real estate described therein be not taxed.

The Court is of the further opinion that the tax attempted to be levied under the statute is not a tax on the [fol. 161] certificate since the statute expressly refers to "interests in lands, and rents and royalties derived therefrom," and when it exempts equitable interests divided into shares not evidenced by transferable certificates, and includes for taxation those shares which are evidenced by such certificates, it makes an unreasonable classification.

As to the contention that the "Intangible Tax" is an income tax rather than a property tax, it will be readily seen from an examination of General Code Sections 5388 and 5389 that the "income yield" is merely a norm to be used in fixing the amount of the tax to be paid and that it is not an "income tax."

The conclusions of the Court herein apply with equal force to all of the certificates described in the petition including the Lincoln Inn Court "ground rent certificates."

In view of the above the prayer of the plaintiff's petition will be granted and a decree in accordance herewith will be entered.

January 13, 1933.

[fol. 162] IN COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

Hamilton County, No. 4397

OPINION

Ross, J.:

This is a proceeding in error from the court of common pleas of Hamilton County, wherein judgment was rendered for plaintiff, enjoining the several taxing authorities now appearing as plaintiffs in error from assessing or collecting certain taxes upon interest of defendant in error represented by so-called Land Trust Certificates, and declaring the laws of Ohio purporting to tax equitable interests in land only when such interests are evidenced by transferable certificates to be unconstitutional and void.

The answer of the Tax Commission denied generally the allegations of the petition, and specifically that the facts alleged gave the court jurisdiction.

The answer of the County Auditor and Treasurer admitted the ownership of the certificates by the defendant in error, and that he had received the alleged income therefrom, and that the tax will be assessed and collected unless enjoined.

[fol. 163] It appears that taking a typical instance of one of the classes of interests in property outside Ohio and designated The Clark-Randolph Building Site Trust, that Wm. G. Pohl and Cecilia Pohl leased to Leo M. Sage certain real estate with the improvements thereon for a period of 99 years; such lease being renewable forever. This real estate was located in Chicago, Illinois. Thereafter, the fee in such real estate was transferred to The Chicago Title & Trust Company, of Chicago, Illinois, and simultaneously with such deed, the Pohls and the Trust Company executed a trust agreement, for the benefit of Pohl and such others as might become parties thereto by acceptance of certifi-

cates of equitable ownership, in which it was provided that the Trust Company, as Trustee, should collect the rents and profits incident to the real estate in question and distribute the "net rentals" to holders of certificates of equitable ownership. In the event the lease should become inoperative through default or termination of the period of the lease, the Trustee agreed to sell the property and distribute the net proceeds of such sale to the certificate holders. There was also a provision for the impounding of certain securities of the lessee with the Trustee and provision was made for the distribution to the certificate holders of the proceeds of these also. An election was reserved to the Trustee to distribute interests in the land in lieu of the sale thereof, if the lease should terminate through lapse of time or by consent.

[fol. 164] The certificates incorporated the provisions of the trust agreement by reference.

The original certificate to Pohl in consideration of the deed to the Trustee provided for 3,250 shares. This evidenced the entire equitable ownership of the trust estate. The defendant in error acquired a certificate calling for a 5/3250ths interest of the equitable ownership and beneficial interest in the property constituting the trust estate held by the Trust Company.

Another trust agreement involved real estate located in the State of Ohio. This is known as the Lincoln Inn Court Trust. The provisions of the trust agreement involved in this instance vary little in substance and effect from the Chicago agreement, hereinbefore noted, except that the real property under this agreement is located in Cincinnati, Ohio, and the beneficial interests are incorporated in "certificates of interest in ground rent," instead of "land trust certificates."

The statutes of Ohio define investments in part as follows:

Section 5323. "• • • Annuities, royalties, and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other

than equitable interests divided into shares evidenced by transferable certificates. * * *"

[fol. 165] The following sections are also pertinent:

Section 5388. "* * * In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield. * * *"

Section 5389. "* * * * 'Income Yield' as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, * * *."

Section 5322. "'Real property' and 'land.' The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

Article XII, section 2 of the Ohio Constitution provides that: "Land and improvements thereon shall be taxed by uniform rule according to value."

It is contended by the defendant in error that the property sought to be taxed evidenced by the certificates is in reality in those instances involving land outside of Ohio, an interest in land outside of Ohio, and as to the land in Ohio is a tax upon an interest in land in Ohio; that in the first case being real property outside the state, it is beyond the jurisdiction of Ohio taxing authorities and in the case of the Ohio property, the tax is paid by the owners in [fol. 166] possession, and this tax upon defendant in error amounts to double taxation.

It is further contended that the classification adopted is discriminatory, unfair, and illegal, in that legal interests in land, whether divided into shares and evidenced by transferable certificates or not are specifically exempted in the statute, as well as equitable interests in land not divided into shares evidenced by transferable certificates (section

5323, General Code), while equitable interests in land divided into shares evidenced by transferable certificates are made taxable by the exception within the exception in the section of the code just noted. In other words, the tax is leveled at the particular interests last mentioned only, and that there is no material mark of distinction or differentiation except the division of the interest into shares evidenced by a transferable certificate.

Taking the first contention, that the tax is in effect an attempt to tax real estate outside the jurisdiction of the State of Ohio, as it is applied to the interests in trust involving land lying without the State, we consider this now disposed of by the case of Rowe v. Braden, 126 Ohio St. 533, in which case the identical section of the statutes herein involved was considered.

There is no more authority in a state to tax personal property without the state than there is to tax real estate. Anderson v. Durr, Auditor, et al., 100 Ohio St. 251, 259; Southern Pacific Co. v. Commonwealth of Kentucky, 222 U. S. 63, 74.

[fol. 167] The syllabus in the case of Rowe v. Braden is as follows:

"Where R. created an irrevocable trust, with corpus located in another state, and appointed a trustee resident of such other state, who, under the terms of the trust, pays the beneficial interest thereof to the widow of R. as cestui que trust, a resident of this state, on the basis of income yield from such trust fund, Section 5323, 5328-1, 5370, 5388, 5389 and 5638, General Code (114 Ohio Laws 714), known as the intangible tax law, requiring such cestui que trust as a beneficiary of such trust fund to list and return such equitable interest in the property for the purpose of taxation, do not violate the Fourteenth Amendment, or any other provision of the federal or state Constitution."

In the opinion, the Court say:

"These quotations from the opinion of the Supreme Court in our judgment demonstrate that the reasoning and principle by which the court reached its conclusion of the constitutionality of the Massachusetts statute were: (1) That the tax it imposed was on an equitable interest in property, owned and protected in Massachusetts, and dis-

tinct from the legal ownership of the trust in Pennsylvania; and (2) that as the domicile of the owner was in the state of Massachusetts this equitable property interest had its situs there, and was, in consequence, subject to the jurisdiction of that state for taxation purposes.

"The objection is made on behalf of the plaintiff in error that 'we are here dealing with a property tax, not an income tax or an excise tax,' and that as the tax in question in the instant case is a property tax the case of Maguire v. Trefry, Tax Commissioner, supra, is not in point.

"This objection is not well taken. The tax under consid- [fol. 168] eration in the case of Maguire v. Trefry, supra, and in the case of Maguire v. Tax Commissioner, supra, affirmed by the Supreme Court of the United States, was declared to be a property tax. In the latter case the court in its opinion said: 'The tax here in question is a property tax. Tax Commissioner v. Putnam, 227 Mass. 522, 531, 532 (116 N. E. 904, L. R. A. 1917F, 806). Whether it be regarded as a tax on the right of the cestui que trust or a tax on the income as received, in either event a property tax is permissible.'

"In the case of Maguire v. Trefry, Tax Commissioner, supra, the court in its opinion said: 'It is the property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.'

"It is not material in the decision of this case, whether, as in Massachusetts, the tax imposed is designated a tax on income, which is derived from the resident beneficiary's interest in the trust, or, as in Ohio, the tax imposed is designated a tax on the resident beneficiary's interest in the trust, as measured by the income therefrom, because, under the ruling of the Supreme Court of the United States in the case of Maguire v. Trefry, Tax Commissioner, supra, 'It is this property right belonging to the (resident) beneficiary, realized in the shape of income,' which is taxed.

"As the facts in that case are quite parallel to those in the instant case, and its legal conclusions, drawn therefrom, equally as applicable, it is the property right belonging to the resident beneficiary, measured by the income, which is taxed in Ohio in the case under consideration."

* * * * * * * *

"The equitable interest for life in the plaintiff in error, created by this trust, is a right enforceable at law, being of a personal nature, and has a situs at her domicile, which is [fol. 169] in Hamilton County, Ohio. The question involved is one of situs rather than a question of particular species of tax which is to be levied."

There is no essential difference between the interest taxed in the Rowe case and that in the instant case. Both are equitable in character and represented by income received by persons within the borders of the state.

If an equitable interest in personal property without the state is taxable, why should a different rule be applied to an equitable interest in real property? It is obvious therefore that it has been held in Ohio that the interest of the defendant in error is not identical with the interest of the owner of the fee. The force of this holding is also directly applicable to the interest in the trust property in Ohio. It is plain that if as to property without the state, there is such complete insulation between the legal and equitable interests, there is no sound reason why there should be such an identity of interest as to property within the state, that the legal and equitable titles should be considered one and justify the claim that the tax of one is a tax upon the other.

The obvious intent of the statute is to reach just such interests as are herein involved. There can be no mistake about this purpose.

The Supreme Court having justified the act as to one interest, as being wholly distinct and separate from the res, it is difficult to see how any distinction can be drawn between that involved in Rowe v. Braden and the one here considered.

[fol. 170] As to the claim of the double, dual, or duplicate taxation, what has been said is in itself an answer to this contention. The tax in question is a tax upon an equitable interest as represented by income received in this State, in one case from property outside of the State, in the other, from property within it. This equitable interest has only been subjected to one tax as far as we are here concerned. This is true both as to the Ohio property and that outside Ohio. There is then in the strict sense no double or duplicate taxation of the same property, involving the same owner or an identical interest.

If by double taxation is meant that in a broad sense the same property has sustained several taxes according to the varied ownerships of the holders of particular interests, the contention must fail in bringing the provision within those cases prohibited by the Federal Constitution. Baker, Receiver, etc., et al., v. Druesedow, Tax Collector, 263 U. S. 137.

There is no prohibition in the Ohio Constitution against double taxation as such.

In Carley & Hamilton v. Snook, 281 U. S. 66 (68 A. L. R. 194, at page 198), the Supreme Court of the United States say:

"The objection that the petitioners should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject-matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See Swiss Corp. v. Shanks, 273 U. S. 407, 413, 71 L. ed. 709, 713, 47 [fol. 171] Sup. Ct. Rep. 393; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 35 Sup. Ct. Rep. 99; Shaffer v. Carter, 252 U. S. 37, 58, 64 L. ed. 445, 459, 40 Sup. Ct. Rep. 221; Ft. Smith Lumber Co. v. Arkansas, 251 U. S. 532, 533, 64 L. ed. 396, 398, 40 Sup. Ct. Rep. 304."

Instances of such double taxation are to be found in every jurisdiction. The stockholder through the corporate fiction pays a tax upon his stock after the corporation has diminished his revenue by the payment of many forms of tax. The mortgagee and the owner pay taxes upon their respective interests. Solvent credits may be taxed to the creditor, although the debtor is taxed upon all his property. The amount due on a policy of insurance may be taxed to the beneficiary, although the funds out of which it is paid are taxed to the insurance company. 26 R. C. L., p. 265, section 233. Lee, Treas. v. Sturges, Insurance Co. v. Ratterman, Treas., 46 Ohio St. 153, 162.

It is charged that the act is unjust, unfair, and that the discrimination between the interests taxed and those exempted by the act is based upon a fanciful, capricious difference.

The exclusion in section 5323, General Code, is specific in referring to interests in land, and rents and royalties de-

rived therefrom, and then excepting from the exception equitable interests (in land) divided into shares evidenced by transferable certificates. If it had been determined that the interest in question was an interest in land (which since we follow Rowe v. Braden, supra, it cannot be), then there [fol. 172] could be no question of discrimination to now decide, for the tax would be extra-territorial and void. Not being an interest in land, the particular section noted as discriminatory is not applicable. Is the classification otherwise discriminatory? Reference to the authorities convinces us that it does not fall within the category of distinctions that are palpably unreasonable, capricious, or fanciful.

The following are noted out of many authorities of similar import:

"Whether the severity of penalties for non-compliance with a state statute renders it unconstitutional under the Fourteenth Amendment will not be considered in an action in which the State does not ask for any penalties.

"The Fourteenth Amendment was not intended to cripple the taxing power of the States or to impose upon them any iron rule of taxation.

"This court will not speculate as to the motive of a State in adopting taxing laws, but assumes—the statute neither upon its face nor by necessary operation suggesting a contrary assumption—that it was adopted in good faith." Southwestern Oil Co. v. State of Texas, 217 U. S. 114, paragraphs 3, 4, and 5 of the syllabus.

In Brown-Forman Co. v. Commonwealth of Kentucky, 217 U. S. 563, it is stated in the 2nd and 3rd paragraphs of the syllabus:

"The function of taxation is fundamental to the existence of the governmental power of the States, and the restriction against denial of equal protection of the law does not compel an iron rule of equal taxation, prevent variety in methods, or the exercise of a wide discretion in classification.

[fol. 173] "A classification which is not capricious or arbitrary and rests upon reasonable consideration of difference of policy does not deny equal protection of the law, and so held that the classification in the Kentucky act of 1906, imposing a license tax on persons compounding, rectifying, adulterating, or blending distilled spirits, is not a

denial of equal protection of the law because it discriminates in favor of the distillers and rectifiers of straight distilled spirits."

State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 537, 540. The 3rd, 4th and 7th paragraphs of the syllabus are as follows:

"3. As applied to the fundamental state power of taxation, the equal protection clause does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations (p. 537).

"4. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it.

"7. An Indiana statute lays an annual license tax on stores, increasing progressively with the number of stores under the same general management, supervision or ownership—such that, in the present case, the owner of a 'chain' of some 225 stores selling groceries, fresh vegetables and meats, was obliged to pay $5,443.00, whereas the owner of a single store only, though it involved a much greater investment and income, would pay but $3.00. *Held* not violative of the equal protection clause, in view of the distinctions and advantages which combine and are exerted in a single ownership and management of a series [fol. 174] of like stores in different locations, as compared with mere cooperative associations of independent stores, or with department stores selling many kinds of goods under the same roof."

The Court say in the opinion at page 540:

"In Rast v. Van Deman & Lewis Co., supra (240 U. S. 342), a statute placing taxes additional to the usual occupations taxes on persons who offered, with merchandise bargained or sold in the course of trade, coupons, profit-sharing certificates, or the like, was attacked as being arbitrary and unreasonable, in that the only difference between the other merchants and those who used trading

stamps was a difference in the method of advertising. This Court said, however (p. 357):

"'The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, * * *'"

Lawrence et al. v. State Tax Commission of Mississippi, 286 U. S. 276, 284. The 8th paragraph of the syllabus is as follows:

"8. The equal protection clause does not require the State to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial, or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

[fols. 175 & 176] See also: Stebbins and Hurley, Executrix and Executor, etc., v. Riley; Controller of the State of California, 268 U. S. 137; Heisler v. Thomas Colliery Co. et al., 260 U. S. 245; Ohio Oil Co. v. Conway, 281 U. S. 146, 159; 26 R. C. L., p. 249, section 221; 61 Corpus Juris, p. 126 et seq.

Even if the statute were applicable, there is an obvious difference between an interest consisting of an entity and one divided into many shares, evidenced by transferable certificates.

We find no unreasonableness in the classification.

For these reasons, the judgment of the court of common pleas is reversed, and judgment may be here entered for the plaintiffs in error.

Hamilton, P. J., and Cushing, J., concur.

[fol. 177] [File endorsement omitted]

IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING PARTY DEFENDANT IN ERROR—Filed Dec. 13, 1934

It appearing to the Court, that, during the pendency of this action, John S. Edwards ceased to be a member of the Tax Commission of Ohio, and that Carleton S. Dargusch succeeded him and is now acting as a member of said Commission,

Ordered that said Carleton S. Dargusch, as a member of the Tax Commission of Ohio, be, and he is, substituted as a party defendant in error in lieu of John S. Edwards as a member of said Tax Commission.

Carl V. Weygandt, C. J.

12/13/34.

Approved; John W. Bricker, Attorney General; Walter M. Locke, Asst. Pros. Atty. Ham. Co., Ohio; Paxton & S., for Plff. in Error; Thos. C. Lavery, Atty. for Tax Commission of Ohio.

[fol. 178] IN SUPREME COURT OF OHIO

No. 24756

MAX SENIOR

vs.

GEORGE C. BRADEN et al.

Error to the Court of Appeals of Hamilton County

JUDGMENT—November 21, 1934

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is

hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, That a special mandate be sent to the Court of Common Pleas of Hamilton County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry".

[fol. 179] IN SUPREME COURT OF OHIO

No. 24756

Decided November 21, 1934

SENIOR

v.

BRADEN et al., Tax Commissioner of Ohio, et al.

Error to the Court of Appeals of Hamilton County

Taxation—Intangible tax law—Land trust certificates evidence existing rights to participate in net rentals—Certificate holders own equitable interests in real estate divided into shares—Income from equitable interests taxable—Section 5323, General Code (114 O. L., 715)—Certificates represent intangible rights and are taxable—Rights taxable at certificate owner's domicile regardless of location of realty—Constitutional law.

1. Land trust certificates in the following trusts, Lincoln Inn Court Ground Rent, Cincinnati, Ohio; Clark Randolph Building Site, Chicago, Illinois; Woman's City Club, Cincinnati, Ohio; Rockefeller Building, Cleveland, Ohio; Insurance Exchange Building, Boston, Massachusetts; City National Bank Building, Omaha, Nebraska; and Fidelity Mortgage Co. Building, Cleveland, Ohio, are mere evidences of existing rights to participate in the net rentals of the real estate being administered by the respective trusts.

2. Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Section 5323, General Code (114 Ohio Laws, 715), does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests.

3. Such certificates represent intangible rights within the purview of Section 5323, General Code (114 Ohio Laws, 715), and are taxable as such, notwithstanding the fact that the particular real estate out of which such rights issue is likewise taxed.

4. Such rights are taxable in the state where the owner is domiciled, regardless of the location of the real estate against which such certificates are issued.

5. Section 5323, General Code (114 Ohio Laws, 715), violates no federal or state constitutional right of the holder of such certificates.

The facts are stated in the opinion.

Messrs. Paxton & Seasongood, for plaintiff in error.

[fol. 180] Mr. John W. Bricker, attorney general, Mr. Perry L. Graham, Mr. E. G. Schuessler, Mr. Thomas C. Lavery, Mr. Louis J. Schneider, prosecuting attorney, and Mr. Walter M. Locke, for defendants in error.

OPINION

STEPHENSON, J.:

The operative facts in this case not admitted in the pleadings are stipulated, so that the question of law involved is clearly presented.

Max Senior, on March 14, 1932, instituted in the Court of Common Pleas of Hamilton county, Ohio, a suit for an injunction against the Tax Commission of Ohio, the County Auditor and the County Treasurer of Hamilton county, Ohio, wherein he sought to perpetually enjoin the Tax Commission, County Auditor and County Treasurer from assessing and collecting the intangible property tax on alleged equitable interests in land owned by him on January 1, 1932, and evidenced by transferable certificates of ownership, viz.:

Description	Trustee	Aggregate denomination or No. of Fractional Interest	Rate	Income yield
Lincoln Inn Court Ground Rent, Cincinnati, Ohio.	Title Guar. & Trust Co., Cincinnati, O.	340/1275	$4.25	$1,445.04
Clark Randolph Building site, Chicago, Illinois.	Chicago Title & Trust Co., Chicago, Ill.	5/3250	52.50	262.50
Woman's City Club, Cincinnati, Ohio.	Title Guar. & Trust Co., Cincinnati, O.	5/1000	2.00	10.00
Rockefeller Bldg., Cleveland, Ohio.	Cleveland Trust Co., Cleveland, Ohio.	2/1400	60.00	120.00
Insurance Exchange Bldg., Boston, Mass.	1st National Bank, Boston, Mass.	1/1900	55.00	13.75
City National Bank Bldg., Omaha, Neb.	Union Trust Co., Cleveland, O.	5/1000	55.00	275.00
Fidelity Mortgage Co., Cleveland, Ohio.	Midland Bank, Cleveland, O.	7/1050	60.00	105.00

The reason given therefor is that the laws of Ohio purporting to tax equitable interests in land only when such [fol. 181] interests are evidenced by transferable certificates are unconstitutional and void.

Specifically, Senior claims that Section 5323, General Code, a section of the Intangible Tax Law (114 Ohio Laws, 714 et seq.), is an arbitrary and unreasonable discrimination and amounts to taking of private property without due process and denies to him, a citizen of the United States, the equal protection of the law, in violation of his rights under Article XIV, Section 1, of the Amendments of the Federal Constitution, viz.:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Senior further claims that the Intangible Tax Law is violative of Section 16 of Article I, Section 5 of Article XII and Section 2 of Article XII of the Constitution of Ohio, in effect when the law was passed. We quote from these sections seriatim so much of the constitutional provision as Senior claims has direct application to Section 5323, General Code, the particular section of which he complains.

Section 16, Article I, Constitution of Ohio:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. * * *"

Section 5, Article XII, Constitution of Ohio:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Section 2, Article XII, Constitution of Ohio:

"No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes, * * *. Land and improvements thereon shall be taxed by uniform rule ac- [fol. 182] cording to value. * * *" (As amended November 5, 1929.)

As the validity of Section 5323, General Code, is specifically attacked, it is herein set out, viz.:

"The term 'investments' as used in this title, includes the following:

"Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by chapter four of this title, and (3) such as are defined in this chapter as 'deposits.'

"Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this state yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever

issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the federal government, or (3) prior to the first day of January, 1913, by the state of Ohio or any political or other subdivision or school district in this state and (4) bonds of the state of Ohio issued pursuant to article VIII, section 2a of the constitution of Ohio and (5) such as are defined in this chapter as 'deposits' and 'current accounts.'

"Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and [fol. 183] other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

"All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located.

"When any corporation provides and carries out a plan for the allotment and sale of any or all of its unissued shares, or of shares purchased or to be purchased, to the employees of the corporation or to the employees of subsidiary corporations or to a trustee on their behalf, and for the payment of such shares in installments or at one time, and for the establishment of a special fund or funds in which such employees during the period of their employment or other period of time may be priviliged to share on such terms and conditions as may be imposed in respect thereof; the relationship between the corporation or the trustee, if any, and each employee shall, for the purpose of determining the tax upon the shares concerned or upon any interest in them, be deemed to be a trust, and any tax upon the said shares or any interest in them shall be levied and assessed accordingly."

Senior further claims that Section 5388, General Code, providing rules for listing and assessing personalty; Section 5389, General Code, providing for the application of

the term "true value in money" and defining "income yield"; Section 5638, General Code, providing for the classification of intangible property and rate of taxation; and Section 5322, General Code, defining "real property" and "land", are so closely related to Section 5323, General [fol. 184] Code, that they must be considered in applying the test of constitutionality to such section.

The County Auditor and County Treasurer admit their official existence and further admit that Senior was, on January 1, 1932, and at the time of filing his suit, a resident of the city of Cincinnati, Hamilton county, Ohio, and on said date was the owner of the land trust certificates as claimed by him, and that as such owner he received during the year 1931 an income of $2231.29, and they admit that unless restrained they will assess and collect the tax thereon in accordance with the tax laws of Ohio. They deny all other claims made by Senior.

The Tax Commission of Ohio admits the official existence of all parties defendant and likewise denies all other claims made by Senior, and it avers affirmatively that Senior's allegations are insufficient to give the court jurisdiction to grant him the relief prayed for.

It was stipulated between counsel that the customary real estate taxes have been levied and assessed against the respective properties which are subjects of the trust agreements in certificates involved herein, and that the lands in which Senior claims an equitable interest have been assessed in the names of the legal owners or lessees thereof, according to law, without any deduction or diminution by reason of his claimed interest in such lands.

The cause proceeded to trial, and twenty-two exhibits were offered and received in evidence. Upon examination it will be found that this documentary evidence is all-sufficient to raise the questions herein presented.

The Court of Common Pleas found in favor of Senior and allowed him a perpetual injunction as prayed for by him. Error from this judgment and decree was prosecuted to the Court of Appeals of Hamilton county, which court reversed [fol. 185] the Common Pleas Court and dismissed Senior's petition. Error is now prosecuted to this court to reverse the judgment of the Court of Appeals.

A righteous tax law is necessarily the product of good sense and good judgment. The first exception that our colonial fathers took to the laws of their parent land was based upon the alleged imposition of unjust taxes, and their posterity has held their banner aloft through all the intervening years—and this is as it should be.

The relentless, incessant attack of the taxpayer against tax laws, state and federal, has resulted in giving to us systems of taxation that, while they are far from perfect, are reasonably fair as between state and citizen. It is fundamental that the expenses of government must be met with funds raised through the medium of taxation by one process or another. The people may place constitutional limitations on the tax rate as often as they see fit, and make them as drastic as even whim or caprice may suggest, but the government must live. So much money must be raised to pay its living expenses. The people having reduced the rate below the living point, the taxing authorities are driven to desperation and they are forced to their final resort, to wit, raising valuations and discovering new "things" and "rights" upon which a tax can be levied, keeping in mind the constitutional restrictions. Naturally the taxing bodies go first to corporeal property, and when that is exhausted they are driven to the incorporeal. The incorporeal property reveals much wealth in Ohio. The terms "incorporeal" and "intangible" are one and the same; neither of them can be "seen or handled."

In this case we are either dealing with land or an intangible right. The nature, value and extent of a right are measured by what you can obtain with it. What can Senior get with his land-trust certificates? Assuredly he can get his pro rata share of income from the trust estate so long as [fol. 186] it is producing income. He insists that under and by virtue of his certificate he has an equitable interest in land upon which the taxes are paid by the holder of the legal title, and that the state has no power to make him pay on it again.

Has not Senior equitable choses in action only? A chose in action is a right to sue. If it is an equitable chose in action, Senior must seek his remedy in a court of equity. Equity acts in personam and not in rem, but we do not regard this as an exclusive test in this case. It is a sidelight.

Senior's rights under his land-trust certificates can in nowise rise higher than the trust instruments under which they were created. What is the most that Senior could get in any case with his land-trust certificates, in case the lessee defaults in payment of rentals?

An examination of the different trust instruments and the land-trust certificates assuredly reveals the fact that it was never intended that the holder of a land-trust certificate should obtain title in severalty to any part of the real estate involved in the trust. True, in the Lincoln Inn Court ground rent the certificate recites that Senior is the owner of 340/1275ths interest in the premises described in the lease, and it further provides that the trustee will deliver special warranty deeds for undivided interests in the premises, subject to the perpetual lease on the surrender of the particular certificate and other certificates, provided no deed shall be demanded for less than $10,000 par value of certificates, until after conveyance for $120,000 par value has been made.

This particular trust is denominated "*Lincoln Inn Court Ground Rent.*" While we admit "there is nothing in a name", resort may be had to a title to determine purpose and intent. Apparently the subject being dealt with was "ground rent." In its last analysis, "ground rent" is money. According to the arrangement, the "ground rent money" was to be divided amongst the holders of certifi- [fol 187] cates, as their interests should be ascertained therefrom. True, the certificate holders could obtain a special warranty deed under certain conditions. Suppose the conditions were ripe, and Senior presented his certificates and demanded a deed. He would get a special warranty deed. We do not know what warranties were omitted. We do know that special warranty deeds are not noted for their market ability. Well, he gets his deed for 340/1275ths of the Lincoln Inn Court property, an undivided interest, and all in the world he could do with his deed under the most favorable circumstances would be to institute partition proceedings—if the time ever presented itself.

All these properties are city properties and cannot be aparted. An appraisement would be returned, property sold, and all that Senior could get would be 340/1275ths of the net selling price of the land in money.

It makes no difference which way he goes, he must take money in any event.

It never was intended by the creators of the trust that Senior should at any time have any of the land in question, and Senior never expected it. All he wanted was his ground rent money, and he got it; and having gotten it he says it is real estate, that the real estate tax has been paid—or at least will be paid—and he cannot be taxed again.

All this argument is indulged to reflect our conclusion as to the Lincoln Inn Court ground rent and, from a legal standpoint, is probably "water over the dam"; inasmuch as Senior was the owner and holder of the certificates on January 1, 1932, intangible tax listing day in Ohio. It was held by the Supreme Court of the United States in the case of Union Tank Line Co. v. Wright, Comptroller Genl. of Georgia, 249 U. S., 275, 286, 39 S. Ct., 276, 63 L. Ed. 602:

[fol. 188] "Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

It was agreed by and between counsel that the decision of this court with respect to the land-trust certificates involved in the Fidelity Mortgage Company property, located at 1940 East Sixth street in the city of Cleveland, Ohio, shall be applied to the other certificates of equitable ownership in Ohio real estate involved in this case, excluding the Lincoln Inn Court building, and that the decision of the court with respect to the certificate involved in the Clark-Randolph building site, Chicago, Illinois, shall be applied to other certificates of equitable ownership in this case relating to real estate outside of Ohio. Consequently, it is only necessary to consider these two matters.

The Fidelity Mortgage Company trust needs but little comment, as in this trust set-up all that the holder of a land-trust certificate thereunder can secure is his pro rata share of the net rentals so long as it is a going concern, and a pro rata share of the net proceeds when the trust is wound up.

In the matter of the Clark-Randolph building site, Chicago, Illinois, the trust arrangement is much the same, except that the trustee is given the election, in the case of the termination of the trust otherwise than by the exercise of the option to purchase, to distribute the trust estate in un-

divided legal interests or by sale and distribution of proceeds, as provided in the trust declaration.

The power to tax is an attribute of sovereignty. The power to tax land extends only to lands within the boundaries of the taxing state. Tangible personal property, permanently located in a state other than the domicile of the owner, is taxable in the state where it is permanently located. It is the general rule that intangible personal property, having neither shape, form nor substance, can have no situs and is taxable at the domicile of the owner. [fol. 189] Cases to support these rules could be cited interminably, but they are so fundamental that we deem it unnecessary to go further than to site the case establishing the rule with reference to the situs of intangible personal property, Maguire v. Trefry, Tax Comm'r. of Mass., 253 U. S., 12, 17, 40 S. Ct., 417, 64 L. Ed., 739, and cases therein cited.

This court followed the Maguire case in the case of Rowe v. Braden et al., Tax Commission of Ohio, 126 Ohio St., 533, 186 N. E., 392. It is claimed that that case is not in point here, because in that case the corpus of the trust consisted wholly of stocks, bonds and cash, whereas in the case before us the corpus of the trust is real estate. If the law, as this court views it, was in harmony with such contention, this case could be easily disposed of.

The terms "property right" and "property tax" are somewhat confusing, particularly in jurisdictions where as a matter of use and custom the words "property" and "land" are synonymous. Whatever the lay view may be, it is universally known as a matter of law that "property" is in all probability our most comprehensive, modern legal term.

Many years ago in Boston & Lowell Rd. Co. v. Salem & Lowell Rd. Co., 68 Mass. (2 Gray), 1, at page 35, a legal definition was given for property, and it is so plain and simple that it has been universally followed, viz.:

"Property • • • extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments."

Likewise in the case of Eaton v. Boston, C. & M. Rd. Co., 51 N. H., 504, 511, 12 Am. Rep., 147, the court said:

"In a strict legal sense, land is not 'property', but the subject of property. The term 'property', although in common parlance frequently applied to a tract of land [fol. 190] * * * in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' "

We have no quarrel with the language used by this court in the case of Cassidy v. Ellerhorst, 110 Ohio St., 535, 144 N. E., 252, 42 A. L. R., 372, viz:

"It is a well-settled principle, so far as Ohio jurisprudence is concerned, that the shares of stock are property, but that the certificates are only the evidence of the ownership of those shares, and that they amount to no more than the title deeds of real estate. The certificates are a great convenience, and of great value as evidence, but they are certainly no more than evidence."

This is a good fundamental law. You cannot tax the evidence of a right, but that does not mean that you cannot tax the right or the product of the right. You cannot tax the land-trust certificates involved herein, but you can tax the product of the right which they evidence, unless such product is land already taxed.

The fact that the declaration of trust and the certificate, one or both, require that their transfer shall be witnessed by all the solemnities required in the execution of a deed and the further arrangement by the parties that such transfer shall be brought within the purview of recording acts, adds nothing to their virtue. When one of these certificates is presented to the County Auditor for transfer and he sees that the certificate calls for an undivided interest in realty, he simply endorses the certificate "transfer unnecessary", and the transferee delivers it to the County Recorder for record.

If as a matter of fact these certificates represent an undivided interest in land, it would be unnnecessary for [fol. 191] the parties to make such provision, as the recording acts would require it.

These trust arrangements, in their administration and distribution of net rentals, approach very close to a corporate entity; and our General Assembly must have sensed

the situation that such organization was merely one set up by way of trust in order to effect a participation in the net rentals of real estate and thereupon enacted Section 5323, General Code, which in effect says, "You cannot escape taxation by means of such subterfuge."

In effect it says, "All incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, excepting interests in land and rents and royalties derived therefrom, *other than equitable interests divided into shares evidenced by transferable certificates*", shall be taxed at their true value in money.

By this enactment the General Assembly delivered a solar plexus blow, to "equitable interests in real estate divided into shares evidenced by transferable certificates."

Did the General Assembly violate Senior's constitutional rights in so doing? The record herein furnishes no evidence as to the initial cost of these certificates to Senior, but we assume that all parties concerned were good business men; that the creators and Senior were not in ignorance of the money market; that they charged and Senior paid substantially one hundred dollars for each six dollars of annual income he received from his land-trust certificates, and this was the head and front of the entire transaction.

Using the County Auditor's and County Recorder's offices as a means of transfer and record renders unnecessary the keeping of a stock and transfer record by the trustee. By this arrangement the initial cost of incorporation and the annual franchise tax is saved.

This is a suit in equity. Equity looks through form to [fol. 192] the substance of things. Senior's land-trust certificates were tantamount to stock certificates in a corporation. The value of the trust corpus in the trust set-up represented the capital stock of the concern. Instead of issuing shares entitling the holders to participate in dividends, land-trust certificates were issued representing a fractional part of the real estate, based upon the valuation fixed in the trust set-up, which certificates entitled their holders to participate in the net rentals of the real estate. Wherein is there a difference except in form?

Since it is our holding that, under his certificates, Senior at best *is the owner of equitable interests in real estate divided into shares evidenced by transferable certificates*,

and since he is not taxed on the equitable interests in real estate, but on the income derived therefrom, we fail to grasp wherein he has been made the victim of double or duplicate taxation.

The learned Court of Appeals went into this question thoroughly and we are in accord with its holding that the facts in this case present no question of double taxation. Senior has not been discriminated against as the member of a class, neither has the class to which he belongs been the victim of discrimination by reason of Section 5323, General Code.

He has not and will not be deprived of his property without due process of law, nor has he been nor will he be denied the equal protection of the law as a citizen of the United States by force of Section 5323, General Code.

We find that Section 5323, General Code, has not deprived Senior of any of his constitutional rights, state or federal, and the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Weygandt, C. J., Jones, Matthias, Bevis, Zimmerman, and Wilkin, JJ., concur.

[fol. 193] Reporter's certificate to foregoing paper omitted in printing.

[fol. 194] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Dec. 13, 1934

PETITION FOR APPEAL

Max Senior, appellant, prays that an order of appeal be entered herein from the final judgment of the Supreme Court of the State of Ohio in the above entitled cause entered November 21, 1934, and for an order fixing the amount of the bond thereon.

Assignment of Errors

Max Senior as appellant to the Supreme Court of the United States from said judgment assigns as error:

1. The Supreme Court of the State of Ohio erred in affirming and in not reversing the judgment of the Court of Appeals of the First District of Ohio entered February 28, 1934, against this appellant.

2. The Supreme Court of the State of Ohio erred in holding that Section 5323, of the General Code of Ohio, violates no federal or state constitutional right of appellant in purporting to tax him as owner of certain certificates of interest in ground rents or land trust certificates of equitable ownership in real estate located in Ohio.

[fol. 195] 3. The Supreme Court of the State of Ohio erred in holding that Section 5323, of the General Code of Ohio, violates no federal or state constitutional right of appellant in purporting to tax him as owner of certain land trust certificates of equitable ownership in real estate located outside of Ohio.

4. Said court erred in holding such certificates represent an intangible right within the purview of Section 5323 and are taxable as such, notwithstanding the particular real estate out of which such right issues is likewise taxed.

5. Said court erred in refusing to hold that Sections 5323, 5389 and 5638, of the General Code of Ohio assessing and collecting taxes on appellant's equitable interests in land in Ohio evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination depriving appellant, a citizen of the United States and of the State of Ohio of the equal protection of the laws, in violation of appellant's rights under the Constitution of the United States and of Article XIV, Section 1, in addition to and amendment thereof, inasmuch as all other equitable interests in land not so evidenced and all legal interests in land, whether so evidenced or not, are exempted by statute from taxation.

6. Said court erred in refusing to hold that Sections 5323, 5389 and 5638, of the General Code of Ohio assessing and

collecting taxes on appellant's equitable interests in land outside of Ohio evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination depriving appellant, a citizen of the United States and of the State of Ohio of the equal protection of the laws, in violation of appellant's rights under the Constitution of the United States and of Article XIV, Section 1, in addition to and amendment thereof, inasmuch as all other equitable interests in land not so evidenced and all legal interests in land, whether so evidenced or not, are exempted by statute from taxation.

[fol. 196] 7. Said court erred in holding that the levying and collection of taxes on appellant's equitable interest in real estate situated outside of Ohio, to wit, in Chicago, Illinois, Omaha, Nebraska, and Boston, Massachusetts, do not amount to an attempt to levy and collect taxes on real property wholly outside the State of Ohio and beyond the taxing power of said state amounting to a taking of appellant's property without due process of law in violation of appellant's rights under Article XIV, Section 1, in addition to and amendment of the Constitution of the United States.

8. Said court erred in holding Section 5323, General Code of Ohio, levies a tax against the income derived from such equitable interests, when income from all other property referred to in Section 5323 is not taxed, in violation of the equal protection clause of Article XIV, Section 1, in addition to and amendment of the Constitution of the United States.

PRAYER FOR REVERSAL.

Appellant, a citizen of the United States and of the State of Ohio, as aforesaid, therefore, prays that the said judgment of the Supreme Court of the State of Ohio dated November 21, 1934, in the above entitled cause be reversed and a judgment ordered in favor of said appellant and for his costs.

Paxton & Seasongood, Attorneys for Appellant.
Murray Seasongood, Robert P. Goldman, Clyde M. Abbott, of Counsel.

[File endorsement omitted.]

[fol. 197] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL APPROVING BOND AND CONTINUING INJUNCTION IN FORCE PENDING APPEAL—Filed Dec. 13, 1934

On reading the petition for appeal to the Supreme Court of the United States of Max Senior, appellant, and it appearing from said petition and the record in the above entitled cause that there was drawn in question the validity of statutes of the State of Ohio on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity,

Ordered that the appeal sought be, and the same is, allowed; and

Appellant having executed to appellees his bond with surety in the sum of Five Hundred Dollars ($500.00), conditioned according to law, said bond is hereby approved and same shall operate as a supersedeas;

Ordered, further, that the mandate in this cause be withheld and that the injunction heretofore granted in this case by the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, continued in full force and effect, pending the final determination of the appeal hereby allowed to the Supreme Court of the United States.

Carl V. Weygandt, C. J.

12/13/34.

[File endorsement omitted.]

[fol. 198] Citation in usual form, showing service on Louis J. Schneider et al., filed Dec. 13, 1914, omitted in printing.

[fol. 199] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO DETERMINATION OF CAUSE, ETC.—Filed Dec. 27, 1934

The stipulation made in this court on May 8, 1934, that counsel for the respective parties had agreed that the decision with respect to the land trust certificate set forth in Exhibit 7 should be applied to the other certificates of equitable ownership in Ohio real estate in this case, excluding the certificate of interest in ground rent of Lincoln Inn

Court Building set forth in Exhibit 1, and that the decision with respect to the land trust certificate set forth in Exhibit 2 should be applied to the other certificates of equitable ownership in this case in real estate situated outside the State of Ohio, shall apply to the determination of this cause in the Supreme Court of the United States.

It is further stipulated that Exhibits 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18, 20 and 22, and those parts of Exhibits 10 and 19 which are duplicated by Exhibits 2 and 7, respectively, need not be printed, as they are made unnecessary by this stipulation.

It is further stipulated that this stipulation be transmitted by the Clerk of the Supreme Court of Ohio to the Supreme Court of the United States to be printed as part of the record on appeal to that court in this case.

Paxton & Seasongood, Murray Seasongood, Attorneys for Plaintiff in Error. Louis J. Schneider, Pros. Atty. Hamilton Co., Ohio; Walter M. Locke, Asst. Pros. Atty., Attorneys for Robert Heuck, as Auditor of Hamilton County, Ohio, and Harry A. Freiberg, as Treasurer of Hamilton County, Ohio, Defendants in Error. Thomas C. Lavery, Special Attorney for the Members of the Tax Commission of Ohio, Defendants in Error. John W. Bricker, Atty. General. E. G. Schuersler, Asst. Atty. Gen., of the State of Ohio; as Attorneys for the Tax Commission of Ohio, Defendants in Error.

[File endorsement omitted.]

[fol. 200] IN SUPREME COURT OF OHIO

[Title omitted]

PRECIPE TO THE CLERK OF THE SUPREME COURT OF OHIO FOR TRANSCRIPT—Filed Dec. 17, 1934

To the Clerk of the Supreme Court of Ohio:

Please make and transmit to the Supreme Court of the United States under your hand and the seal of the Supreme Court of Ohio, a true copy of the material parts of the record in the case entitled as above and numbered 24756 on the docket of the Supreme Court of Ohio (substituting for the formal titles, files, pleadings and papers filed, the descriptions and dates thereof as hereinafter given) namely:

1. The printed record filed herein on May 25, 1934, containing the proceedings in this cause in the Common Pleas Court of Hamilton County and in the Court of Appeals for the First Appellate District of Ohio, and the petition in error and order authorizing plaintiff in error to dispense with the printing of certain exhibits.

2. Judgment entry of affirmance of November 21, 1934.

3. Opinion of the Supreme Court of Ohio, including the syllabus, of November 21, 1934.

4. Opinion of the Common Pleas Court of Hamilton County in this cause, filed January 13, 1933.

5. Opinion of the Court of Appeals in this cause, filed January 8, 1934.

6. Entry substituting party-defendant in error, entered December 13, 1934.

7. Petition for an appeal, assignment of errors and prayer for reversal, filed December 13, 1934.

8. Statement of jurisdiction, filed December 13, 1934.

[fol. 201] 9. Bond on appeal, filed and approved, December 13, 1934.

10. Order allowing appeal, approving bond and continuing injunction in force pending appeal, entered December 13, 1934.

11. Citation, filed December 13, 1934.

12. Proof of service, filed December 13, 1934.

13. Precipe to the Clerk of the Supreme Court of Ohio for transcript, filed December 13, 1934.

Paxton & Seasongood, Attorneys for Appellant.
Murray Seasongood, Robert P. Goldman, Clyde M. Abbott, of Counsel for Appellant.

Received notice of filing the above precipe and receipt of copy of same is acknowledged. Appellees desire to make no additions thereto.

Louis J. Schneider, by Walter M. Locke, Asst. Pros. Atty., Attorneys for Robert Heuck, Auditor of Hamilton County, Ohio, and Harry A. Freiberg, Treasurer of Hamilton County, Ohio; John W. Bricker, Attorney General of the State of Ohio; E. G. Schuersler, Asst. Atty. General, Attorney for the Tax Commission of Ohio. Thomas C. Lavery, Special Attorney for the Tax Commission of Ohio, For Appellees.

[File endorsement omitted.]

[fols. 202-204] Supersedeas Bond on Appeal for 500.00, approved Dec. 13, 1934, omitted in printing.

[fol. 205] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 206] SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY AND OF THE PARTS OF THE RECORD THOUGHT NECESSARY FOR CONSIDERATION THEREOF—Filed Jan. 21, 1935

I. The Supreme Court of the State of Ohio erred in holding that Section 5323, of the General Code of Ohio, violates no federal or state constitutional right of appellant in purporting to tax him as owner of certain certificates of interest in ground rents or land trust certificates of equitable ownership in real estate located in Ohio.

II. The Supreme Court of the State of Ohio erred in holding that Section 5323, of the General Code of Ohio, violates no federal or state constitutional right of appellant in purporting to tax him as owner of certain land trust certificates of equitable ownership in real estate located outside of Ohio.

III. Said court erred in holding such certificates represent an intangible right within the purview of Section 5323 and are taxable as such, notwithstanding the particular real estate out of which such right issues is likewise taxed.

IV. Said court erred in refusing to hold that Sections 5323 5389 and 5638, of the General Code of Ohio assessing and collecting taxes on appellant's equitable interests in land in Ohio evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination depriving appellant, a citizen of the United States and of [fol. 207] the State of Ohio of the equal protection of the laws, in violation of appellant's rights under the Constitution of the United States and of Article XIV, Section 1, in addition to and amendment thereof, inasmuch as all other equitable interests in land not so evidenced and all

legal interests in land, whether so evidenced or not, are exempted by statute from taxation.

V. Said court erred in refusing to hold that Sections 5323, 5389 and 5638, of the General Code of Ohio assessing and collecting taxes on appellant's equitable interests in land outside of Ohio evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination depriving appellant, a citizen of the United States and of the State of Ohio of the equal protection of the laws, in violation of appellant's rights under the Constitution of the United States and of Article XIV, Section 1, in addition to and amendment thereof, inasmuch as all other equitable interests in land not so evidenced and all legal interests in land, whether so evidenced or not, are exempted by statute from taxation.

VI. Said court erred in holding that the levying and collection of taxes on appellant's equitable interest in real estate situated outside of Ohio, to wit, in Chicago, Illinois, Omaha, Nebraska, and Boston, Massachusetts, do not amount to an attempt to levy and collect taxes on real property wholly outside the State of Ohio and beyond the taxing power of said state amounting to a taking of appellant's property without due process of law in violation of appellant's rights under Article XIV, Section 1, in addition to and amendment of the Constitution of the United States.

VII. Said court erred in holding Section 5323, General Code of Ohio, levies a tax against the income derived from such equitable interests, when income from all other property referred to in Section 5323 is not taxed, in violation of the equal protection clause of Article XIV, Section 1, in addition to and amendment of the Constitution of the United States.

[fol. 208] VIII. The Ohio Supreme Court erred by authorizing a tax under Section 5323, Ohio General Code, in effect, taxing the certificates, whereas, according to the settled rule of property in Ohio, Opinions of the Attorney General of Ohio, Probate Courts of Ohio and decisions of courts outside of Ohio, such certificates represent only an equitable undivided interest in real estate which, under

Section 5322, Ohio General Code, is real property or land not taxable under the Ohio Intangible Tax Law.

IX. The court erred in holding that Section 5323 applies to income from rents derived from land outside of the State of Ohio, thereby depriving appellant of property without due process of law.

X. The court erred in sustaining a tax on appellant's certificate of interest in the property on which the Lincoln Ian Court Building is located and taxing his interest in said premises.

XI. The court erred in holding appellant's land trust certificates are "tantamount to stock certificates in a corporation."

The parts of the record which the appellant thinks are necessary for the consideration of said points are as follows:

The record filed in the Supreme Court of Ohio containing the following:

In the Supreme Court of Ohio—

Petition in Error Claiming Constitutional Questions.
Waiver of Summons.
Order Authorizing Plaintiff in Error to Dispense with the Printing of Certain Exhibits.

In the Court of Appeals—

Transcript of Docket and Journal Entries.
Petition in Error.
Waiver of Summons in Error.
[fol. 209] Application for Rehearing.
Entry Denying Application for Rehearing.
Judgment Entry.
Entry Substituting Party Plaintiff in Error.
In the Court of Common Pleas—
Transcript of Docket and Journal Entries.
Petition.
Motion for Temporary Restraining Order.
Answer of Robert Heuck and Edgar Friedlander.
Entry Granting Temporary Restraining Order.
Answer of the Defendants, George C. Braden, Quincy A. Davis, John S. Edwards and Anthony J. Kraus.

Final Decree.

Motion for a New Trial.

Entry Overruling Motion for a New Trial.

Notice of Appeal.

Bill of Exceptions.

Exhibit 1—Certificate of Interest in Ground Rent, Lincoln Inn Court Building.

Exhibit 2—Land Trust Certificate, Clark-Randolph Building Site.

Exhibit 7—Land Trust Certificate, East Sixth Street, Cleveland, Ohio.

Exhibit 9—Declaration of Trust of The Title Guarantee & Trust Company of Cincinnati, in connection with the Lincoln Inn Court Building.

Exhibit 10—Agreement and Declaration of Trust in connection with Clark-Randolph Building Site, Land Trust Certificates.

Exhibit 19—Agreement and Declaration of Trust in connection with East Sixth Street, Cleveland, Ohio, Land Trust Certificates.

Exhibit 21—Advance Payment Tax Receipt, 1932.

Opinion of the Common Pleas Court of Hamilton County, Ohio, filed January 13, 1933.

Opinion of the Court of Appeals of the First Judicial District of Ohio, filed January 8, 1934.

And also the following papers filed in the Supreme Court of Ohio, to wit:

[fols. 210 & 211] Judgment entry of affirmance of November 21, 1934.

Opinion of the Supreme Court of Ohio, including the syllabus, of November 21, 1934.

Entry substituting party defendant in error, entered December 13, 1934.

Petition for an appeal, assignment of errors and prayer for reversal, filed December 13, 1934.

Bond on appeal, filed and approved December 13, 1934.

Order allowing appeal approving bond and continuing injunction in force pending appeal, entered December 13, 1934.

Citation, filed December 13, 1934.

Proof of service, filed December 13, 1934.

Precipe to the Clerk of the Supreme Court of Ohio for transcript, filed December 17, 1934.

Stipulation filed December 27, 1934.

Murray Seasongood, Robert P. Goldman, Clyde W. Abbott, Attorneys for Appellant.

Acknowledgment is made of service of copy of the above statement of the points on which appellant intends to rely and of the parts of the record thought necessary for the consideration thereof this 8 day of January, 1935.

Louis J. Schneider, Pros. Atty. Ham. Co. Ohio; Walter M. Locke, Asst. Pros. Atty., Attorneys for Robert Heuck, as Auditor of Hamilton County, Ohio, and Harry A. Freiberg, as Treasurer of Hamilton County, Ohio, Defendants in Error. Thos. C. Lavery, Special Attorney for the Members of the Tax Commission of Ohio, Defendants in Error. John W. Bricker, Attorney General of the State of Ohio; E. G. Schuersler, Asst. Atty. Gen. of Ohio, as Attorneys for the Tax Commission of Ohio, Defendants in Error.

[fol. 212] [File endorsement omitted.]

Endorsed on cover: File No. 39,286. Ohio Supreme Court. Term No. 658. Max Senior, appellant, vs. George C. Braden, Quincy A. Davis, Carleton S. Dargusch, et al., etc. Filed January 21, 1935. File No. 658, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 658

No. 24756. Supreme Court of Ohio.

MAX SENIOR,

Appellant,

vs.

GEORGE C. BRADEN ET AL.,

Appellees.

STATEMENT AS TO JURISDICTION.

(a) The statutory provision believed to sustain the jurisdiction of the United States Supreme Court in this case is Section 237 (a) of the Judicial Code, contained in the Act of February 13, 1925, Chapter 229, 43 Stat. 936, page 39:

> "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes."

(b) The statute of the State of Ohio, the validity of which is involved, is Section 5323 of the General Code of Ohio (114 Ohio Laws, 715-16), which reads as follows:

> "The term 'investments' as used in this title, includes the following:
>
> "Shares of stock in corporations, associations and joint stock companies, under whatever laws organized

or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the Federal government for the taxation of which by the several States no provision is made by act of the Congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by chapter four of this title, and (3) such as are defined in this chapter as 'deposits.'

"Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this State yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the Federal government, or (3) prior to the first day of January, 1913, by the State of Ohio or any political or other subdivision or school district in this State and (4) bonds of the State of Ohio issued pursuant to Article VIII, Section 2a of the Constitution of Ohio and (5) such as are defined in this chapter as 'deposits' and 'current accounts.'

"Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

"All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located."

There are also involved Sections 5388 (114 Ohio Laws, 720-1), 5389 (114 Ohio Laws, 721), 5638 (114 Ohio Laws, 722) and 5322 (General Code of Ohio, 1910, Volume 2, page 1145).

"SEC. 5388. . . . Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Money shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of Section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed.

"Credits and other taxable intangibles shall be listed and assessed at the true value thereof, in money, on the day as of which the same are required to be listed.

"Personal property of the following kinds, used in business, shall be listed and assessed at fifty per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at

the times as of which it is required to be estimated on the average basis, as the case may be. * * *"

"SEC. 5389. * * * As used in Section 5388 of the General Code and elsewhere in this chapter, the 'true value in money' of any property means the usual selling price thereof at the time or times and places as of which it is required to be listed; but if there is no usual selling price known to the person whose duty it is to fix a value thereon, then, such price as is believed could be obtained therefor in money, at such time or times and place. In the case of personal property used in business, the book value thereof, if any, less book depreciation, at such time or times, shall be listed and such depreciated book value shall be taken to be the true value of such property, unless the assessor shall find that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from depreciated book value must be made in writing by the taxpayer at the time of making return; and when such return is made to the county auditor and required by this chapter to be transmitted to the commission for assessment, the county auditor shall, as deputy of the commission, investigate such claim and shall enter thereon, or attach thereto, in such form as the commission may prescribe, his findings and recommendations with respect thereto; when such return is made to the commission such claim for deduction shall be referred to the auditor of each county wherein the property affected thereby is listed, as such deputy, for investigation and report.

"'Income yield' as used in Section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

"In the case of an obligation bearing interest, the amount of interest separately charged and paid dur-

ing such year, if any, exclusive of payments on the principal; in the case of shares of stock, the cash dividends so paid; in the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per centum of half of the principal used to purchase the same, or, if there be no such principal, four per centum of half of the present worth of such payments if commuted, which shall be calculated, as of the date on which such investment is required by this chapter to be first listed, with interest at four per centum per annum and, in the case of annuities for life or lives, according to the Combined Annuity Four Per Cent Table; in the case of equitable interests, the cash distributions of income so made. At the request of the commission or of any county auditor, the superintendent of insurance shall, upon being furnished with a statement of the facts, compute upon a basis equivalent to that herein prescribed, the income yield of any investment as to which the interest is not charged and paid separately from the principal thereof, and the assessor shall be governed by the computation so made."

"SEC. 5638. For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this State, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the State of Ohio at the following rates, to-wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar."

"SECTION 5322. The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

(c) The date of the judgment sought to be reviewed is November 21, 1934, and the date upon which the application for appeal was presented is December 13th, 1934.

The nature of the case will perhaps best be made apparent from the syllabus of the opinion of the Ohio Supreme Court, filed November 21, 1934, as follows:

"1. Land trust certificates in the following trusts, Lincoln Inn Court Ground Rent, Cincinnati, Ohio; Clark Randolph Building Site, Chicago, Illinois; Woman's City Club, Cincinnati, Ohio; Rockefeller Building, Cleveland, Ohio; Insurance Exchange Building, Boston, Massachusetts; City National Bank Building, Omaha, Nebraska and Fidelity Mortgage Co. Building, Cleveland, Ohio, are mere evidences of an existing right to participate in the net rentals of the real estate being administered by the respective trusts.

"2. Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Section 5323, General Code, does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests.

"3. Such certificates represent an intangible right within the purview of Section 5323, General Code, and are taxable as such, nothwithstanding the fact that the particular real estate out of which such right issues is likewise taxed.

"4. Such rights are taxable in the State where the owner is domiciled, regardless of the location of the real estate against which such certificates are issued.

"5. Section 5323, General Code, violates no Federal or State constitutional right of the holder of such certificates."

In the Ohio Supreme Court, the syllabus is written by the court and is the law of the case.

The suit was brought by appellant as plaintiff in the Common Pleas Court of Hamilton County, Ohio, against the Tax Commission of Ohio and the Auditor and Treasurer of Hamilton County, Ohio, to enjoin the defendants from placing on the tax duplicate and collecting taxes on plaintiff's certificates of equitable interest in real estate evidenced by conveyable certificates. The petition reads, in part:

"Plaintiff says that the assessing and collecting of taxes on plaintiff's said equitable interests in land evidenced by transferable certificates, when all other equitable interests in land not so evidenced are exempted therefrom, is an arbitrary and unreasonable discrimination without warrant of law, and amounts to a taking of private property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the law, in violation of plaintiff's rights under the Constitution of the United States and of Article XIV, Section 1, of the amendments thereto.

"Plaintiff further says that the lands in which plaintiff has such equitable ownership, as aforesaid, have been assessed in the names of the legal owners or lessees thereof according to value, without any deduction or diminution by reason of plaintiff's interests in said lands. Plaintiff says that the levying and collecting of taxes on his equitable interests in the lands so assessed at full value in the names of the owners of lessees constitutes double and unequal taxation in vio-

lation of the Constitution of Ohio and Article XII, Sections 2 and 5 thereof. Plaintiff further says that equitable interests in land whether evidenced by transferable certificates or not, constitute interests in real estate within the purview of Section 5322 of the General Code of Ohio, defining real property and land; and that Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land other than by uniform rule is contrary to Article XII, Section 2, of the Constitution of Ohio, which provides that 'land and improvements thereon shall be taxed by uniform rule according to value'.

"Plaintiff further says that the levying and collecting of taxes on plaintiff's equitable interests in real estate situated outside the State of Ohio, to-wit, the Clark Randolph Building Site in Chicago, Illinois, the Insurance Exchange Building in Boston, Massachusetts, and the City National Bank Building in Omaha, Nebraska, is an attempt to levy and collect taxes on property wholly outside the State of Ohio, is beyond the taxing power of the State of Ohio and amounts to a taking of private property without due process of law in violation of the Constitution of the State of Ohio and Article I, Section 16 thereof, and of the Constitution of the United States and Article XIV, Section 1, of the Amendments thereof."

The Common Pleas Court rendered an opinion reported in 30 O. N. P. (n. s.) 147, and entered a final decree to the effect that

"Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land, and rents derived therefrom, when such equitable interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereof; and that the relief prayed for in plaintiff's petition should be granted."

This judgment was reversed by the Court of Appeals for the First District of Ohio, which found in its judgment entry:

> "That the Court of Common Pleas erred in holding that Section 5323 of the General Code of Ohio insofar as it purports to tax equitable interests in lands and rents derived therefrom when such interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereto.
>
> "It is therefore considered and ordered by the Court that the judgment heretofore rendered in this cause by said Court of Common Pleas be, and the same hereby is, reversed and that the petition of this defendant in error in the court below be, and the same hereby is, dismissed at the costs of the defendant in error."

This appellant then prosecuted error to the Supreme Court of Ohio as a matter of right under Section 2 of Article IV of the Constitution of Ohio which provides that the Supreme Court shall have:

> "appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this State, * * *."

The petition in error summarized the petition filed in the trial court and the contention that the statutes above referred to denied to plaintiff, a citizen of the United States and of the State of Ohio, the equal protection of the laws and deprived him of his property without due process of law in violation of his rights under the Constitution of the United States and of Article XIV, Section 1, in addition to and amendment thereof, the subsequent judgments of

the Common Pleas Court and Court of Appeals and assigned as error:

> "(e) Said Court of Appeals erred in holding that the aforementioned section of the General Code of Ohio, constituting part of the intangible tax law, applied to plaintiff's interests in said property, and that it was not in violation of the plaintiff's rights guaranteed by the Constitution of the United States of America and of Article XIV, Section 1 in addition to and amendment thereof, in each of the particulars hereinbefore set forth.
>
> • • • • • • •
>
> "(f) The judgment of the Court of Appeals is contrary to law and in violation of plaintiff in error's constitutional rights under the Constitutions of Ohio and also of the United States."

There thus can be no doubt that the plaintiff from the beginning alleged that Section 5323 and the other Ohio statutes involved requiring the assessment and collection of taxes on plaintiff's equitable interests on land evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination without warrant of law because other equitable interests in land not so evidenced and all legal interests in land, whether so evidenced or not, were exempted from taxation, because such taxation constituted double and unequal taxation inasmuch as the lands in which plaintiff has an equitable interest have been assessed in the names of the legal owners or lessees thereof according to value without any deduction or diminution by reason of plaintiff's interest in said lands and taxes have been paid by the owners or lessees thereof, and this amounted to a lack of uniformity in taxation and an unconstitutional discrimination and that the levying and collection of taxes on this appellant's equitable interest in real estate situated

outside of Ohio amounted to a taking of property without due process of law, in violation of plaintiff's rights under Article XIV, Section 1, in addition to and amendment of the Constitution of the United States. With the judgments of the several courts above quoted providing in terms that the statute was and was not in violation of the Federal Constitution and with a petition in error to the Supreme Court taken as of right because of claims under the State and Federal Constitutions, and with the fifth paragraph of the syllabus of the decision of the Supreme Court of Ohio expressly reciting that Section 5323, General Code, violates no Federal constitutional right of the holder of such certificates, the case is clearly within the jurisdictional provision relied on.

The Supreme Court, in paragraph 2 of the syllabus, holds Section 5323, Ohio General Code, does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests. But that section taxes all other property therein referred to and not the income derived therefrom, such income being only a measure of the value of the property. Such taxation of the income derived from equitable interests in land only, makes Section 5323 a discriminatory tax law offending against the equal protection clause of the XIV Amendment of the United States Constitution.

Royster Guano Company v. *Commonwealth of Virginia*, 253 U. S. 412.

Moreover, the court failed to take into account opinions of the highest court of other States and the opinions of Attorneys General of Ohio, the Securities Department of Ohio, and the Probate Courts of Ohio, amounting to a long settled construction that such land trust certificates are nothing but equitable interests in real estate and are to be treated as real estate.

Other cases believed to sustain the jurisdiction include:

First National Bank v. *Maine*, 284 U. S. 312 (1932), in which the court said at page 326:

> "It long has been settled law that real property cannot be taxed * * * except by the State in which it is located."

Louisville and Jeffersonville Ferry Co. v. *Kentucky*, 188 U. S. 385, in which it was held that the exemption from taxation extends not only to physical property beyond the jurisdiction, but to incorporeal rights therein.

Sellinger v. *Commonwealth of Kentucky*, 213 U. S. 200 (1909), in which it was held that Kentucky could not tax warehouse receipts for whiskey when the whiskey itself was exempt because beyond the jurisdiction of the taxing State.

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194;

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 38;

Frick v. *Pennsylvania*, 268 U. S. 473.

Every court, except the Court of Appeals and Ohio Supreme Court in the present case, that has had the question before it, has held a land trust certificate to be an interest in realty and not subject to taxation as personal property.

Narragansett Mutual Fire Ins. Co. v. *Burnham*, 51 R. I. 371;

Bates v. *Decree of Court*, 131 Me. 176.

The Rhode Island case cites Opinion No. 3640 of the Attorney General of the State of Ohio, rendered in 1926 (pp. 375-7), that:

> "Holders of land trust certificates issued under a declaration of trust executed by the Cleveland Trust

Company of Cleveland, Ohio, as trustee, dated June 1, 1922, are not required to list said certificates for taxation."

The Attorney General of Ohio was later called upon to determine the relation of dealers in land trust certificates to the Ohio Blue Sky Law, and in 1926 Opinions (p. 528) the following syllabus appears:

"The sale of land trust certificates representing part of the equitable ownership in the premises to be occupied by the Bankers Building, at Chicago, is a sale of foreign real estate * * *."

As early as 1839, in *Lessee of Avery* v. *Dufrees*, 9 Oh. 145, it was decided that equitable interests in land should be treated the same as legal interests, so far as the laws of descent are concerned, and this holding, supplemented by others in later years, amounted to a rule of property that equitable interests in land are real estate in Ohio.

Respectfully submitted,

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
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Solicitors for Max Senior, Appellant.

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No. 658

Supreme Court of the United States

OCTOBER TERM, 1934

MAX SENIOR,

Appellant,

v.

GEORGE C. BRADEN, QUINCY A. DAVIS, CARLETON S. DARGUSCH and ANTHONY J. KRAUS, constituting the Tax Commission of Ohio; ROBERT HEUCK, as Auditor of Hamilton County, Ohio, and HARRY A. FREIBERG, as Treasurer of Hamilton County, Ohio,

Appellees.

BRIEF FOR APPELLANT

INTRODUCTION

This case comes here on appeal from a judgment against appellant of the Supreme Court of Ohio (R. 167). It originated as a suit in equity by appellant, a resident in and taxpayer of the City of Cincinnati, Hamilton County, Ohio, against the members of the Tax Commission of Ohio, and the Auditor and Treasurer, respectively, of Hamilton County, Ohio, to enjoin the collection of an intangible property tax on equitable interests in real property in a form popularly called land trust certificates, owned by appellant, on the grounds that said tax was unauthorized by law, and, if authorized, was attempted to be assessed in violation of

the specific provisions of the Ohio Constitution and the Constitution of the United States of America and Amendments thereto.

In the Common Pleas Court of Hamilton County, Ohio, an injunction was granted, on the grounds that the provisions of the statutes attempting to tax the owner of these land trust certificates violate both the Ohio and the United States Constitutions. The opinion of the Common Pleas Court is reported in 30 Ohio Nisi Prius (New Series) 147 (R. 141).

The Court of Appeals reversed, holding that the statutes taxed these interests and that the provisions of the Ohio Intangible Tax Act, as so construed, do not violate any provision of the Ohio or United States Constitutions. The opinion of the Court of Appeals is reported in 48 O. A. 255, not yet published in a bound volume, but found in the advance sheets of Ohio State Bar Association Report for December 24, 1934 (R. 157).

The Ohio Supreme Court affirmed the judgment of the Court of Appeals, holding that the statutes apply and do not violate the Constitutions of Ohio or of the United States of America or any Amendments thereto. Its opinion is reported in 128 O. S. 597, not yet published in a bound volume, but found in the advance sheets of Ohio State Bar Association Report for December 17, 1934 (R. 168).

Statements as to the jurisdiction of this Court (printed separately) and of the points on which appellant intends to rely (R. 186) have already been filed. This Court noted probable jurisdiction on February 4, 1935.

STATEMENT OF THE CASE

1. The Statutes Involved

In 1931 the Ohio General Assembly (hereinafter referred to as the Legislature) passed an act entitled "An Act pro-

viding for the levy of taxes on intangible property at classified rates and for the assessment of tangible personal property for taxation" (114 Ohio Laws 714). This amended certain sections of the Ohio General Code. The first amended section was Section 5323 (*id.* 715), defining "investments" for the purposes of the act. This entire section is set forth in the appendix to this brief. The parts pertinent to this case read as follows:

> "The term 'investments' as used in this title, includes the following:
>
> . . . . . .
>
> Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting . . . (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates. . . ."

Section 5388 (*id.* 720) specifies the rules for listing and assessing personal property. This entire section is set forth in the appendix to this brief, but the pertinent parts thereof read as follows:

> "In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed.

Section 5389 (*id.* 721; see appendix for entire section) defines "income yield" as follows:

> "'Income yield' as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:
>
> ". . . in the case of equitable interests, the cash distributions of income so made."

Section 5638 (*id.* 722; see appendix for entire section) reads in part:

> "Classification of intangible property and rate of taxation.
>
> "For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to-wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar."

Before the enactment of the Intangible Tax Act, Section 5322, which remains in effect unchanged and has not been amended since the adoption of the official code of 1910 (2 General Code of Ohio, 1910, 1145), defines "real property" and "land" as follows:

> "'Real property' and 'land.' The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

Acting under the above provisions of the Intangible Tax Act, the State Tax Commission and the local taxing authorities required the listing of land trust certificates and would have required the payment of the five per cent tax based on the "income yield" thereof had not the injunction in this cause been granted appellant in the Common Pleas Court (R. 49, 50).

2. Statement of Facts

The appellant, Max Senior, was, on January 1, 1932, the tax date involved in this controversy, the owner of certain land trust certificates set forth in the petition (R. 42) as admitted by the auditor's and treasurer's answer (R. 48). (See, also, testimony of Senior, R. 56.) These are:

Lincoln Inn Court ground rent, Cincinnati, Ohio;
Clark-Randolph Building Site, Chicago, Illinois;
Woman's City Club, Cincinnati, Ohio;
Rockefeller Building, Cleveland, Ohio;
Insurance Exchange Building, Boston, Massachusetts;
City National Bank Building, Omaha, Nebraska; and
Fidelity Mortgage Company, Cleveland, Ohio.

Four of the pieces of real estate for which land trust certificates were issued are represented by property located in Ohio. One of these is the Lincoln Inn Court ground rent, Exhibit 1 (R. 65-67). The declaration of trust is Exhibit 9 (R. 82 to 93, inclusive). It has been stipulated that the decision on the land trust certificates with reference to the property located on East Sixth Street, Cleveland, Ohio, Exhibit 7 (R. 75 to 82), shall be controlling with respect to the other certificates of equitable ownership on Ohio real estate, other than the Lincoln Inn ground rent (R. 7 and 183).

Three of the pieces of property represented by land trust certificates are located outside of Ohio, one in Massa-

chusetts, one in Nebraska and the third in Illinois. It has been stipulated that the decision as to land trust certificates of equitable ownership in the Clark-Randolph Building Site, located in Chicago, Illinois, represented by Exhibit 2 (R. 67 to 75), shall be controlling with respect to the other certificates of equitable ownership on real estate situated outside of Ohio (R. 7 and 183).

Appellant returned all of his taxable personal property, and included the land trust certificates in the list of personal property, as required by the Tax Commission. He paid the tax on everything except the land trust certificates (R. 56, 140). This suit was brought to restrain the assessment and collection. The injunction allowed is still in force and will be until the case is finally determined by this court (R. 34-36 and 183).

It is stipulated that the customary real estate taxes had been levied and assessed against the respective properties which were the subjects of the trust agreements and certificates involved in this case and that the taxes had been assessed in the names of the legal owners or lessees thereof according to law, without any deduction or diminution by reason of plaintiff's (appellant's) claimed interests in said lands (R. 59).

A. The Lincoln Inn Court Ground Rent

The certificate for the Lincoln Inn Court ground rent recites that it is a "Certificate of Interest in Ground Rent" (Exhibit 1, R. 65). It reads:

> "Whereas Max Senior has this day purchased and paid for an undivided interest in said premises amounting to 340/1275ths.
>
> "Now therefore, this certificate witnesseth that said Max Senior is the owner of an undivided 340/1275ths interest in the premises described in said lease" (R. 65-66).

The premises described are:

> "the premises at the northwest corner of Main Street and Patterson Alley in Cincinnati, fronting seventy-six feet and three inches, more or less, on the west side of Main Street, and being the property on which the Lincoln Inn Court Building is located" (R. 65).

The effect of his ownership is to entitle him to receive his proportionate share of the rents reserved and paid under the lease. The lease is for ninety-nine years, renewable forever, with the privilege of purchase after ten years, to Charles F. Dickson (R. 65). The appellant had an undivided interest and would have been entitled at any time to a special warranty deed for his interest (R. 66).

B. The Clark-Randolph Building Site, Chicago

The holder of a land trust certificate in the Clark-Randolph Building Site located in Chicago, Illinois, on the other hand, has, by the express terms of the certificate, an "equitable ownership" in the building site (Exhibit 2, R. 67). The certificate reads:

> "Max Senior is registered on the books of the Trustee hereinafter named as the owner of five three thousand two hundred and fiftieths (5/3250ths) of the equitable ownership and beneficial interest in certain property located at the northeast corner of Clark and Randolph Streets, Chicago, Illinois, fronting approximately one hundred and eighty feet on the easterly side of Clark Street, and approximately one hundred and sixty feet on the northerly side of Randolph Street, the title to which is held by Chicago Title and Trust Company, as Trustee for the benefit of the holder or holders of this Certificate and of similar Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (R. 67 and 68).

The real estate described is leased for the term of ninety-nine years, with a privilege of renewal for another term of ninety-nine years and also with the privilege of purchase (R. 69 and 70). The equitable title represented by the land trust certificate must be conveyed with the same formality as a deed (R. 72-74). The certificate itself recites in a note:

> "This transfer deals with an interest in Illinois real estate" (R. 72).

In another note it is provided:

> "The execution of the above instrument of transfer must be acknowledged before a notary public or other officer authorized by the laws of the State of Illinois to take acknowledgments of deeds and in the manner in said laws more particularly set forth to constitute such acknowledgments valid and legal acknowledgments under the then existing laws of said State" (R. 74).

The spouse must release dower (R. 72).

C. The East Sixth Street, Cleveland, Ohio, Property

The land trust certificate of the property leased to the Fidelity Mortgage Company, in Cleveland, Ohio, recites that it is a "Land Trust Certificate of Equitable Ownership in Property located on East Sixth Street, Cleveland, Ohio" (Exhibit 7, R. 75). The certificate reads:

> "Max Senior is the owner of six one thousand and fiftieths (6/1050ths) of the equitable ownership and beneficial interest in certain property located at 1940 East Sixth Street, opposite Vincent Street, in the City of Cleveland, Ohio" (*ibid.*).

The property is leased to the Fidelity Mortgage Company for ninety-nine years, renewable forever (R. 77). The

form of "assignment" specified on the certificate is the form for the transfer of real estate (R. 79-82). "Two witnesses are required" (R. 80). The acknowledgment recites that the individual acknowledges that he signed a "conveyance" (ibid.). There is a note that:

> "The execution of the above assignment must be acknowledged before a notary public or other officer authorized by the laws of the State of Ohio to take acknowledgments of deeds" (R. 82).

D. The Declaration of Trust

1. Re Clark-Randolph Building Site

Coming to the declaration of trust of the Trustee for the Holders of Land Trust Certificates of Equitable Ownership in the Clark-Randolph Building Site, of Chicago (Exhibit 10, R. 94), we find that the trustee is holding the title acquired by it to:

> "Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original Town of Chicago" (R. 95).

The deed to the trustee is dated March 1, 1928, but was in fact executed and delivered simultaneously with the declaration of trust. The premises are subject to an Indenture of Lease by and between William G. Pohl and wife, who conveyed to the trustee as lessors, and Leo M. Sage, as lessee, also dated March 1, 1928 (R. 95). This lease is for a period of ninety-nine (99) years, renewable at the option of the lessee for one additional term of ninety-nine (99) years (R. 96), with privilege of purchase by the lessee. This privilege of purchase is for amounts ranging from three million, four hundred twelve thousand, five hundred dollars ($3,412,500.00) to three million, two hundred sixty-six thousand, two hundred and fifty dollars ($3,266,250.00), depending upon when the privilege is exercised (R. 99).

The land trust certificate holder is entitled to his proportionate share of the net rent, when, as and if collected by the trustee (R. 98), and his proportionate share of the purchase price, in case privilege of purchase is exercised (R. 100), or his proportionate share of the property held in trust in case there is default and the trustee decides to distribute, instead of making a sale (R. 115, 116).

The declaration of trust may be amended from time to time or the trust terminated by written instrument executed and acknowledged by the trustee and consented to in writing by the owner or owners of three-fourths in amount of the interests issued and outstanding (R. 115). It is provided that no such amendment shall increase the liabilities of the lessee under the lease without its consent nor shall it deprive or take from the trustee the control and/or the discretion conferred upon it under the declaration of trust, nor shall it confer upon the owner or owners of outstanding shares, or any of them, any control over or voice in the administration of the trust. A copy of any such instrument must be filed by the trustee in the Recorder's office of Cook County, Illinois (R. 115). The holder of a land trust certificate has no authority to control the trustee in any manner, nor has he any voice whatsoever in the management of the property.

Article V of the Declaration of Trust (R. 105) provides in part:

> "In the event that the Lessee shall make default in any of the provisions of the Lease, so that it shall become necessary, or in the opinion of the Trustee advisable, for the Trustee to terminate the same, then the Trustee shall have full authority to terminate the Lease and to sell the Trust Estate and terminate the trust, and in such case or in any other contingency either with or without terminating the lease to take such other action with respect to the Lessee, the Lease or the Trust Estate as it shall deem advisable, without

> reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof, and no person dealing with the Trustee shall be bound or privileged to inquire concerning the authority of the Trustee so to act."

Transfers of land trust certificates and the equitable interests evidenced thereby are filed by the trustee for record in the office of the Recorder of Deeds of Cook County, Illinois (R. 108), and a certificate of title is given by the Chicago Title & Trust Company to each new land trust certificate holder (R. 109). Article XIV of the Declaration of Trust provides in part (R. 115-116):

> "In any case of the termination of this trust otherwise than upon the exercise by the Lessee of its option to purchase the Trust Estate, distribution shall be made by the Trustee in kind by conveyance of the Trust Estate in undivided legal interests, or at the election of the Trustee, by sale and distribution of proceeds as in this Declaration provided. Upon a conveyance by the Trustee of the Trust Estate in undivided legal interests, as herein provided, all of the Certificates issued hereunder and then outstanding, including those in the Depreciation Fund, as well as any held by the Lessee, shall be cancelled by the Trustee."

2. Re East Sixth Street, Cleveland, Ohio

The trustee for holders of land trust certificates of equitable ownership in property located on East Sixth Street, Cleveland, Ohio, is The Midland Bank, of Cleveland, Ohio, which holds the fee, subject to a lease to The Fidelity Mortgage Company, Exhibit 19 (R. 117). There is a full description of the real estate held in trust (R. 118-119) which begins:

> "Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being part of Original Two Acre Lot No. 92, and bounded and described as follows."

The premises are subject to an Indenture of Lease by and between the Trustee, as lessor, and The Fidelity Mortgage Company, as lessee, dated July 1, 1925 (R. 120), which is the same date as the Declaration of Trust. The term of the lease is for ninety-nine (99) years, renewable for further terms of ninety-nine (99) years each forever (R. 120). The rental is fifty-seven thousand, seven hundred and fifty dollars ($57,750.00) a year for the first fifteen (15) years and sixty-six thousand, nine hundred dollars ($66,900.00) a year for the balance of the term, payable quarterly, plus compensation to the Trustee, all taxes, assessments, levies and public charges levied or assessed upon the leased premises or any improvements thereon, and any additional charges, costs and expenses of the Trustee (R. 120-121).

The other essential features are substantially the same as those noted in connection with the Declaration of Trust of the Clark-Randolph Building Site, except that there are no specific provisions requiring transfers of land trust certificates to be recorded in the office of the County Recorder, new certificates of title to be given to the purchasers or transferors, or relating to conveyance of the property by undivided interests to the certificate holders in case of default by the lessee. Article X (beginning at R. 130) provides in part:

> "In the event that the Lessee shall make default in any of the provisions of the Lease so that it shall have become necessary, or, in the opinion of the Trustee advisable, for the Trustee, as Lessor, to terminate the same, the Trustee shall give not less than fourteen (14) days' notice thereof to the Beneficiaries by registered letter mailed to their last addresses, as furnished by them to the Trustee, such notice to be deemed commenced with the mailing of said letters, and shall request therein advice as to whether the property should be offered for sale, or whether another lease thereof should be made, if possible. If the holders of not less

than a majority in interest of the outstanding Certificates shall, within fourteen (14) days after the expiration of the period of notice above provided, notify the Trustee, in writing, of their agreement upon the course to be taken, the Trustee shall endeavor in its discretion to comply with their wishes. In the event of the failure or neglect of the holders of not less than a majority in interest of the outstanding Certificates to express their wishes within the period above provided, or, in the event the Trustee shall find, after making reasonable efforts, that it is impracticable to comply with such expressed wish of said Certificate holders, it shall have full authority to take such action with respect to selling, leasing for ninety-nine (99) years renewable forever, or for lesser terms, managing, operating or otherwise disposing of said property as it may deem advisable and for the best interest of said Certificate holders."

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

The appellant intends to rely on the assignments of error, numbered 1 to 8, inclusive, set forth in its Petition for Appeal (R. 180-182).

QUESTIONS INVOLVED

1. Is the interest of a land trust certificate holder an interest in real property?

2. If so, may Ohio, consistently with the provisions of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, tax such interest in real property located outside of Ohio?

3. If it is an interest in real property, may Ohio, consistently with the provisions of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, tax such interest in real property, when Ohio has already levied and assessed real estate taxes against

the respective properties in the names of the legal owners or lessees thereof, according to law, without any deduction or diminution by reason of the appellant's claimed interest in said real property?

4. Does it constitute unconstitutional discrimination to tax equitable interests in land "divided into shares evidenced by transferable certificates" and to exempt from taxation (a) the same equitable interests when not represented by such certificates; and (b) legal interests in land, whether divided into shares or not, and whether represented by transferable certificates or not?

5. Does the Ohio intangible tax levy an income tax on land trust certificates and, if it does purport to do so, would not that violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States with respect (a) to all property, whether located in or outside of Ohio; (b) to property located outside of Ohio?

ARGUMENT

I. The Interest of a Holder of a Land Trust Certificate is an Interest in Real Property

It has been frankly admitted by opposing counsel in their briefs in the Court of Appeals for the First District of Ohio and in the Supreme Court of Ohio that if appellant's interests evidenced by the land trust certificates in question are interests in real estate, then they cannot constitutionally be taxed in Ohio; but it was contended by appellees that they are in the nature of choses in action and, therefore, subject to valid provisions of the Ohio Intangible Tax Law.

The Section of the General Code of Ohio (5323) which defines "investments" for purposes of taxation clearly defines these "investments" as "interests in land."

"Interests in land and rents and royalties derived therefrom" are therein exempted from taxation, except:

> *"Equitable interests"* (*i. e.*, in land) *"divided into shares evidenced by transferable certificates."*

See, also, Sec. 5322, quoted *supra*. When the statute itself in terms refers to this species of property as "interests in lands," that ought to be conclusive that for the purposes of the statute they are such.

Moreover, land trust certificates had previously, in 1926, been recognized by the Attorney General of Ohio as interests in real property and, therefore, not subject to taxation as personal property under the then existing statutes which taxed all personal property at a uniform rate. See 1926 *Opinions of Attorney General of Ohio*, 375 (No. 3640). The syllabus of that opinion reads:

> "Holders of land trust certificates issued under a declaration of trust executed by the Cleveland Trust Company of Cleveland, Ohio, as trustee, dated June 1, 1922, are not required to list said certificates for taxation."

In the course of his opinion, the Attorney General said (pp. 376, 377):

> "The land trust certificate is exactly what its name implies—a certificate evidencing an interest in the equitable ownership of land held in trust, and is, therefore, a real estate investment. It is not in any sense a mortgage, a leasehold bond or note, but is an evidence of actual ownership in whatever property may be trusteed as a basis for the issuance of any particular series or designation of certificates. The certificate is merely an evidence of the holder's simple individual share in the ownership of large parcels of property.
>
> "As these certificates are merely an evidence of ownership they have, of course, no par value or other fixed nominal value. Nothing but custom and convenience

govern the price at which the certificates are sold and the interest which accrues thereupon. As the land trust certificate is merely an evidence of ownership, there is, of course, no such thing as maturity; and as it is merely evidence of equitable ownership of real estate, no personal property taxes are payable thereon.

"In the case of *Morrison* v. *Manchester*, 58 N. H. 538, at page 563, it is stated that:

> "'When an owner has left his farm in trust for his widow and children, and the trustee holding the legal title without any beneficial interest pays the farm taxes and expenses out of the farm income, and pays the rest of the income to the widow and children, a second tax for the same amount is not assessed on the equitable title of the widow and children. For the purpose of taxation the legal title of the trustees and the equitable title of the widow and children are not more than the whole title, legal and equitable, which the testator had in his lifetime. If the testator, dividing the equitable title and beneficial interest into four shares, gave two shares to his widow and one share to each of his two children, directed the trustee to issue to them certificates as evidence of their respective rights in the trust property, the united title of the trustee and the widow and children would not be more than the title of the testator.'

"In *Sears on Trust Estates in (as) Business Companies*, it is stated in section 114, at page 168, that:

> "'It seems impossible to find any case maintaining or attempting to maintain the proposition that the legal and equitable interest in the same property may both be taxed, at least where trustee and beneficiaries reside in the same state. On the contrary, all theory of this being lawful as to capital stock and shares of stock of a corporation is that they are distinct and independent properties, there being a legal interest in the former, and

> a legal interest in the latter, that is to say, diverse legal interests in different things. In a trust there is a legal interest and its dependency, an equitable interest. If the latter is destroyed, a beneficiary ceases to be, but the property resumes the status it had before the subsidiary interest began.'

"It is therefore believed that the holders of the land trust certificates authorized under the aforesaid declaration of trust are not required to list them for taxation.

"You further inquire if it would make any difference if the real estate in question was located outside of Ohio, or the trustee was a non-resident of this state; or if the trustee was a non-resident and the land was also without the state.

"It is believed that the said statement of changed status would make no difference in our answer as before herein stated.

"In *Sears Trust Estates*, page 168, it is stated that:

> "'Therefore it may be said that in the state where both trustees and cestui que trust reside one tax is all that may be imposed; and if they reside in different states, the tax is imposed where the property is held.'"

Later, the Attorney General was called upon to determine the relation of dealers in land trust certificates to the Ohio Blue Sky Law. (1926 *Opinions of Ohio Attorney General*, 528, No. 3869.) The syllabus of that opinion reads:

> "The sale of land trust certificates representing part of the equitable ownership in the premises to be occupied by the Bankers Building at Chicago, is a sale of foreign real estate and subject to the provisions of section 6373-15 of the General Code."

These opinions as to the nature of land trust certificates were followed by the Probate Courts (R. 33) and by the administrative authorities in Ohio.

Following the opinions rendered by the Attorney General of Ohio land trust certificates increased in popularity. The typical ones involved in this case, Exhibits 1, 2 and 7 (R. 67 and 75), are dated respectively December 14, 1929 (R. 67), December 26, 1929 (R. 71), and May 29, 1931 (R. 79).

Much of the savings of conservative investors in cities like Cincinnati had been invested in lands in the business district, subject to ninety-nine year leases. As these lands increased in value, it became impractical for many persons of moderate means, who desired this type of investment, to purchase a single piece of business property, subject to a ninety-nine year lease. To meet this need, the plan for issuance of land trust certificates was devised. Real estate was then and still is taxed by uniform rule at its full value. See Article XII, Section 2, of the Constitution of Ohio and Section 5328 (for full text, see appendix; 114 O. L. 717).

The essential rights and obligations of an equitable owner of real estate have long been recognized in Ohio as the same as those of a legal owner. A judgment for specific performance may operate as a conveyance of the defendant's title. General Code of Ohio, Section 11590 (see appendix for full text; 3 General Code of Ohio, 1910, page 2840, enacted as early as 1853; 51 O. L. 119). The purchaser of real estate was liable for any loss to the improvements on the property from the time of his contract, even before he had a deed, unless he stipulated to the contrary in the agreement.

Oak Building & Roofing Co. v. *Susor*, 32 Ohio Appeals 66 (Lucas County, 1929).
Gilbert & Ives v. *Port*, 28 O. S. 276 (1876, semble).

The first reference by the Ohio Legislature to land trust certificates was in 1919, when it made them, subject to certain specified restrictions, legal as investments for savings banks. Ohio General Code, Section 710-140(d). (108 Ohio

Laws, Part 1, 116. The full text of this law appears in the appendix to this brief.)

In 1928 there appeared in 2 *Cincinnati Law Review* 255 an article on "Land Trust Certificates With Relation to Ohio Law." This article showed that the legal incidents governing the holder thereof were the same as those of any other interests in real property. On pages 255 and 256 of this article appears this conclusion:

> "The result is that the land trust certificate holder has an equitable, instead of a legal, interest in the real estate. While this changes slightly the legal situation, the holder, for purposes of transfer, descent and most of the ordinary incidents of ownership, is in the same position as if he held the legal title, with certain exceptions that will be discussed hereafter."

This statement was based on two Ohio decisions: *Lessee of Avery* v. *Dufrees*, 9 Ohio 145 (1839), and *Biggs* v. *Bickel*, 12 O. S. 49 (1861). The former case held equitable interests in land should be treated the same as legal interests, so far as the laws of descent in Ohio were concerned. Judge Hitchcock said on page 147 of that case:

> "What is *real estate?* I take it to be the interest which a man has in land, tenements or hereditaments. If it be such an interest as can be enforced in a court of law, it is a legal interest or estate. If it be such as can only be enforced in a court of chancery, it is an equitable interest or estate. But in either case it is 'real estate' or property."

In *Biggs* v. *Bickel*, 12 O. S. 49 (1861), it was held (syllabus, third paragraph):

> "That the equitable interest of B. in the land was 'real estate' within the meaning of the statute of 1824, and subject to sale under the statute."

See, also, comment of Judge Sutliff, page 59.

In *Bolton* v. *Bank*, 50 O. S. 290, the second paragraph of the syllabus reads:

> "Equitable estates vest and descend as legal estates."

In Ohio, since 7 O. S. 155 (1858), the syllabus of the case has been written by the court and represents the law of the case. 14 Ohio Law Reporter 469, 5 O. S. vii, 6 O. S. viii. See the opinion of Judge (later United States Circuit Judge) Donahue in *State ex rel. Donahey* v. *Edmondson*, 89 O. S. 93 (1913), at page 107, as follows:

> "It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all the members concurring in the judgment."

In *Zumstein, Treasurer*, v. *Coal & Mining Co.*, 54 O. S. 264 (1896), Judge Shauck said at page 271:

> "The term 'lands' when not restricted in meaning by related provisions, includes all interests therein."

As stated in 2 Cincinnati Law Review 255:

> "The land trust certificate merely represents a split up for the convenience of the ordinary investor of the ancient form of investment known as the 'ground rent.'"

In *McCammon* v. *Cooper*, 69 O. S. 366 (1903), the Supreme Court of Ohio held (first paragraph of syllabus):

> "A 'ground rent' being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands within the meaning of section 4158, Revised Statutes, relating to descent and distribution."

Bank v. *Logue*, 89 O. S. 288 (1914), decided that execution could be levied on equitable interests in real estate in

the same manner as on legal interests. This exhausts the legislation, literature and decisions in Ohio regarding land trust certificates and the nature of equitable interests, where the trust *res* is land.

This Court, in *Brown* v. *Fletcher*, 235 U. S. 589, held that an equitable interest is not a chose in action, but an interest in property. The question arose with regard to the jurisdiction of the District Court of a suit by a nonresident assignee of an equitable interest against the assignor and the trustee, both residents of the same state. The District Court held that under the provisions of Section 24 of the Judicial Code, which limited jurisdiction of the United States District Court when suit was brought therein "to recover upon any promissory note or other chose in action in favor of any assignee" (235 U. S. at page 595), it had not jurisdiction. This Court reversed that holding. Mr. Justice Lamar, speaking for the entire court, said (pages 597 and 598):

> "If the trust estate consisted of land it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of section 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell Case*, nothing in section 24 to prevent the holder by virtue of a bill of sale from suing for the 'recovery of the specific thing or damages for its wrongful caption or detention.' And if the funds had been converted into cash, it was still so far property—in fact instead of in action—that the owner, so long as the money retained its earmarks, could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the Trustee,—not in opposition to the *cestui que trust* so as to give him a chose in action, but—in possession for his benefit in accordance with the terms of the testator's will."

The court said further on pages 598 to 600:

"But here there was no contract and this is not a suit for a breach of a contract. For whatever may have been the earlier view of the subject (Holmes Common Law, 407, 409) the modern cases do not treat the relation between Trustee and *cestui que trust* as contractual. The rights of the beneficiary here depended not upon an agreement between him and Braker, but upon the terms of the will creating the trust and the duty which the law imposed upon the Trustee because of his fiduciary position. And a proceeding by the beneficiary or his assignee for the enforcement of rights in and to the property, held—not in opposition to but—for the benefit of the beneficiary, could not be treated as a suit on a contract, or as a suit for the recovery of the contents of a chose in action, or as a suit on a chose in action. *Upham* v. *Draper*, 157 Massachusetts 292; *Herrick* v. *Snow*, 94 Maine 310. See also *Edwards* v. *Bates*, 7 Man. & G. 590; *Nelson* v. *Howard*, 5 Maryland 327.

"The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. *Ham* v. *Van Orden*, 84 N. Y. 257, 270; *Stringer* v. *Young, Trustee*, 191 N. Y. 157; *Lawrence* v. *Bayard*, 7 Paige 70; *Woodward* v. *Woodward*, 16 N. J. (Eq.) 83, 84. The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property. Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to recover

> property or an interest in property when the requisite value and diversity of citizenship existed. *Barney* v. *Baltimore*, 6 Wall. 280. The equity jurisdiction of such courts extends to suits by heirs against executors and administrators (*Security Co.* v. *Black River Bank*, 187 U. S. 211, 228) and to suits against Trustees for the recovery of an interest in the trust property by the beneficiary or his assignee."

See, also, *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83.

The Comptroller of the Currency considers land trust certificates interests in real estate: national banks are forbidden to own them. (See, testimony of Rowe, R. 61.)

Land trust certificates representing interests in real estate in Ohio have been held not subject to personal property taxes in Rhode Island, on the ground that they represent interests in Ohio real estate. In *Narragansett Mutual Fire Ins. Co.* v. *Burnham*, 51 R. I. 371 (1931) the court said (page 375):

> "In our opinion the land trust certificate owned by the petitioner is not a security within the meaning of the statute but is a muniment of title to an equitable interest in real estate in Ohio. Such appears to be the status of these certificates in that State. No Ohio decision bearing upon this question has been called to our attention, due doubtless to the fact that no attempt has been made to tax them there as personal property under the advice of the attorney general that land trust certificates similar to those in the case before us represent an equitable interest in real estate and are not taxable as personal property. Opinion No. 3640 of the Attorney General of the State of Ohio."

In *Bates* v. *Decree of Court*, 131 Me. 176 (1932), it was held that a certificate of beneficial interest in Massachusetts real estate trust was not subject to inheritance taxa-

tion by the State of Maine, because it was an interest in realty located in Massachusetts.

In *Morrison* v. *Manchester*, 58 N. H. 538 (1879), at 563, the court said:

> "The division of the title into legal and equitable parts is not a multiplication of the property."

The Massachusetts courts, while uniformly holding that an equitable interest in real estate, evidenced by a pure trust, is real property, have distinguished the cases of the management type of trust, popularly known as "Massachusetts trusts," which are held to be associations. In these associations the *cestui que trust* is held to have an interest analogous to that of a stockholder in a corporation and this is held to be personal property. The beneficiaries of pure real estate trusts have been held not taxable on trusts in land located outside Massachusetts, while the beneficiaries of management or business trusts have been held taxable.

Dana v. *Treasurer and Receiver General*, 227 Mass. 562 (1917).
Priestley v. *Burrill*, 230 Mass. 452 (1918).
Williams v. *Milton*, 215 Mass. 1 (1913).

The court held in the *Williams* case that the Boston Personal Property Trust was a pure trust and not a partnership because it provided for no meetings of the *cestuis*, though their consent was required, without a meeting, for certain actions of the trustees. The trustees had a right to sell the trust securities and reinvest the proceeds and also a limited power to borrow on the security of the trust property. The sole substantial rights of the *cestuis que trustent* were to have the property administered in their interest by the trustees, to receive income while the trust lasted, and their share of the *corpus* when the trust came to an end.

Those are exactly the rights which the *cestui* has in the principal case and he is, therefore, the beneficiary of a pure trust, and not a shareholder or partner.

The United States courts have had occasion to distinguish pure trusts from business organizations operating under the name and form of trusts, in several recent cases involving federal taxation. In *Hecht* v. *Malley*, 265 U. S. 144, the question was whether certain "Massachusetts Trusts" were taxable under the Revenue Act of 1918 as "associations." The trusts in that case, which were of the management type, were held to be associations. In distinguishing between pure trusts, which would not be taxable, and the other kind which would, this Court said (page 147 of 265 U. S.):

> "Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created."

Applying that test to the present case we find that the trustee, which is in each instance a bank or trust company, and which holds only one piece of property in trust, is "free from the control of the certificate holders in the management of the property." Therefore, a pure trust is created. See, *Crocker* v. *Malley*, 249 U. S. 223.

In *Commissioner of Internal Revenue* v. *Brouillard*, 70 Fed. (2d) 154 (C. C. A. 10, 1934) a similar question was raised. The court, citing all the federal decisions on the subject, held that the entities in question should have been

taxed as trusts, not as associations. The court on page 157, in the footnote, cites Article 1504 of Regulation 45, under the Revenue Act of 1918, and similar articles under the later Revenue Acts, as showing the distinctions between the pure trust and the management type of trust.

See, also, *Tyson v. Commissioner of Internal Revenue*, 54 Fed. (2d) 29 (C. C. A. 7, 1931).

The General Counsel of the Bureau of Internal Revenue has ruled that the rentals received by a trustee for land trust certificate holders are not subject to corporation taxes as income received by an association. General Counsel's Memorandum 1940, Cumulative Bulletin VII-7-3606 (page 2) (1928).

The significance to our case of these federal cases, and other similar cases cited in the cases mentioned, is that in none of the trusts involved in the principal case is there anything in the nature of a conduct of a business by the trustee, nor is there any control of the acts of the trustee by the certificate holders, "whether through the right periodically to elect trustees or otherwise." The authorities impose the tax only when the trustee is actually engaged in conducting some business and the *cestuis* have some measure of control. The receipt by the lessor of income from leased property and its distribution do not constitute "doing business." *McCoach* v. *Minehill Railroad Co.*, 228 U. S. 295; *Emery, Bird, Thayer Realty Co.* v. *United States*, 198 Fed. 242 (D. C. W. D. Missouri, W. D. 1912).

The fact that under certain circumstances the trustee might, at a future date, have the power to sell and distribute the proceeds, would not work an equitable conversion, changing the interest of the *cestui* from real estate into personalty. This was held in the *Dana* and *Priestley* cases, cited *supra*, which are in accord with *Smith, Admr.*, v. *Loewenstein*, 50 O. S. 346 (1893). In that case there was

a lease of a parcel of land for ninety-nine years renewable forever with privilege of purchase. The privilege was exercised by the lessee after the death of the lessor. The question was whether the real estate was realty or personalty in the hands of the lessor's administrator. The court held that it was real estate, as the option to convert into personalty had not been exercised until after the death of decedent, and would not relate back to the time of the execution of the lease. See, also, on this question, *Baker* v. *Commissioner of Corporations and Taxation*, 253 Mass. 130.

See, also, *Bartlett* v. *Gill*, 221 Fed. 476 (1915), affirmed by the Circuit Court of Appeals for the First Circuit in *Gill* v. *Bartlett*, 224 Fed. 927; *Wheless* v. *Wheless*, 92 Tenn. 293 (1893); and *National Department Stores* v. *Board of Equalization and Review of Ohio County*, 111 W. Va. 203 (1931).

Coming now from the decisions to opinions of text writers, we find the following:

In *1 Perry on Trusts* (Seventh Edition) 7, the author says,

> "Thus interests in land became of three kinds: first, the estate in the land itself, the *old common-law fee;* secondly, the *use,* which was originally a creature of equity, but after the statute of uses it drew the estate in the land to itself, so that the fee and use were joined and made but one legal estate, not differing from the old common-law fee except in the manner of its creation; and, thirdly, the trust of which the common law takes no notice, but which in a court of equity carried the beneficial interest and profits, and is still a creature of that court, as the use was before the statute."

In *Bogert, Handbook of the Law of Trusts*, 427, the author observes,

> "While legal scholars have disagreed as to whether the right of cestui que trust is in personam, in rem,

or partly both, the modern tendency is to give the right of cestui que trust incidents which make it, not only a right against the trustee to have the trust carried out, but also the equivalent of ownership of the trust res in equity."

He adds, on page 430,

"The situation would seem to be summarized by the statement that, while the right of cestui que trust was originally purely in personam against the trustee, it has been increasingly a right in rem and is now substantially equivalent to equitable ownership of the trust res. The cestui que trust, of course, also has rights in personam against the trustee."

In *3 Pomeroy Equity Jurisprudence*, Fourth Edition, 1928, Section 975, page 2117, the author states,

"In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership as legal estates are property in contemplation of courts of law. In fact, the entire dealing of equity with the subject of equitable estates, and the fundamental distinction between equitable and legal conceptions and modes, are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action,—not mere rights to obtain certain equitable remedies. . . . In short, the equitable estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate is a mere form and shadow."

In *Salmond on Jurisprudence*, Section 90, page 228 (Fifth Edition, 1916), this appears:

"The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the

essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person."

In 4 *Kent's Commentaries* 303, the author says,

"The *cestui que trust* is seized of the freehold in the contemplation of equity. The trust is regarded as the land, and the declaration of trust is the disposition of the land."

Professor Austin W. Scott, of the Harvard Law School, states in the conclusion of his article on "*The Nature of the Rights of the Cestui Que Trust*," in *17 Columbia Law Review* 269, at page 289,

"It has been shown that the creation of a trust has always been regarded as a legal transaction quite different in its nature from the creation of an obligation. It has been shown that the rights of the *cestui que trust* in respect to their duration, transmission and alienation are treated like property rights rather than like obligations. It has been shown that the reasons usually urged as proving that the rights of the *cestui que trust* are obligations and not property rights do not establish that proposition; the *cestui que trust* may be beneficial owner though the trustee is legal owner; the nature of equitable remedies is not conclusive as to the nature of equitable rights; the fact that the trustee has some positive or affirmative duties is immaterial."

On page 290 the author continues:

"The trustee is a buffer between the *cestui que trust* and the world; as against the rest of the world he has the rights of an owner, and he has the duties of an owner; but these rights he holds for the benefit of the *cestui que trust*, and the burden of these duties he can,

> by the aid of a court of equity, shift to the trust property and even, in some cases, to the *cestui que trust* himself. But when it is necessary for the protection of the *cestui que trust*, equity will recognize that he is in very truth beneficial owner of the trust property."

See, also, Dean Pound's review of Willoughby, *The Legal Estate*, in 26 *Harvard Law Review* 462, at page 464.

Huston on *The Enforcement of Decrees in Equity* (1915) treats in Chapter VI (beginning at page 87) of "The Development of Equitable Interests into Real Interests." He shows (p. 98) that as early as 1647, Rolle, J., said in *Rex* v. *Holland*, Style 20, 21:

> "A trust is *not* a thing in action but may be an inheritance or a chattel as the thing falls out."

On pages 147 and 148, Huston says:

> "The cases, then, which involve transfers by cestui of his equitable estate, like those where the legal estate is transferred by the trustee by virtue of his power, show that cestui's interest is regarded as a genuine property interest. It is submitted that the following recent statement by an American judge phrases with accuracy the existing legal situation, as to the rights and powers of both cestui and trustee:
>
> "'Under our system the cestui que trust is the real owner of the property, and the trustee merely the depositary of the legal title. His is not a property right but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed but a power that may be exercised.'" (Quotation from *Arnold* v. *South Pine Lumber Co.*, 58 Tex. Civ. App. 186, 198 [1909].)

In an article written by the then Dean now Mr. Justice Stone in 1917, in 17 *Columbia Law Review* 467, on *"The Nature of the Rights of the Cestui Que Trust,"* the author

takes the opposite point of view, i. e., that for many purposes an equitable interest is a chose in action, no matter what may be the nature of the trust *res*. This Court has decided, however, that an equitable interest in property will be regarded as property of the same kind as the trust *res*, and not as a chose in action, in *Brown* v. *Fletcher*, 235 U. S. 589, cited *supra*. In *Allen* v. *Commissioner of Internal Revenue*, 49 Fed. (2d) 716 (C. C. A. 2, 1931), at page 718, Circuit Judge Learned Hand, speaking for the court, expresses the view that *Brown* v. *Fletcher*, *supra*, has decided for the federal courts that the *cestui que trust* has a present "equitable interest" in the *res*. We also respectfully submit that the Supreme Court of Ohio had uniformly, until the decision in this case, adopted the same rule of property, and that it has been followed or approved in tax cases by the highest courts of Massachusetts, Maine, Rhode Island, West Virginia, Tennessee and New Hampshire, and, so far as we have been able to find, has not been disapproved in any tax case decided by any American court of last resort, except the case at bar. The Ohio Supreme Court did not mention any of these cases or writers in its opinion.

In tentative draft No. 1 of *The Restatement of the Law of Trusts*, by The American Law Institute (March 10, 1930), Section 126, reads:

> "THE NATURE OF THE BENEFICIARY'S INTEREST.
>
> . . . . . .
>
> "(b) If the trust property is real property, the interest of the beneficiary is real property. . . ."

II. Interests in Real Estate Cannot, Under the Provisions of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, be Taxed by a State in Which the Real Estate is not Located

In *First National Bank* v. *Maine*, 284 U. S. 312, at page 326, this Court said:

> "It long has been settled law that real property cannot be taxed, . . . except by the state in which it is located."

In *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, it was held that the exemption from taxation extends not only to physical property beyond the jurisdiction of the court, but to incorporeal rights therein and that a franchise granted to a Kentucky corporation by the proper authorities of Indiana, for maintaining a ferry across the Ohio River from the Indiana to the Kentucky shore, was an Indiana franchise, and as such an incorporeal hereditament derived from, and having its legal situs for purposes of taxation in, Indiana. The fact that the Kentucky corporation had also a Kentucky franchise to carry on the business from the Kentucky to the Indiana shore (the jurisdiction of Kentucky extending to low water mark on the northern and western side of the Ohio River), did not bring the Indiana franchise within the jurisdiction of Kentucky for purposes of taxation.

That a certificate evidencing the right is held in Ohio makes no difference. In *Selliger* v. *Commonwealth of Kentucky*, 213 U. S. 200, it was held Kentucky could not tax warehouse receipts for whiskey when the whiskey itself was exempt, because beyond the jurisdiction of the state. The decision of the Court of Appeals of Kentucky, which had sustained the tax, was reversed. Mr. Justice Holmes, delivering the opinion of this Court, said (page 204):

"So that it will be seen that the effect is the same as if the whiskey itself had been taxed, and the question is whether, by such a dislocation of the documents from the things they represent, a second property of equal value is created for taxing purposes, which can be reached although the first could not. Possibilities similar in economic principle sometimes have to be, or at least have been, recognized, but of course, economically speaking, they are absurd."

Further on (page 206) this court said:

"We take it to be almost undisputed that if the warehouses were in Kentucky the State would not and could not tax both the whiskey and the receipts, even when issued in Kentucky form, and that it would recognize that the only taxable object was the whiskey."

See, also, *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112, decided November 5, 1934, in which it was held that Pennsylvania could levy an inheritance tax on pictures loaned by a resident of New York to an art museum in Pennsylvania for an indefinite period and still there at the time of decedent's death. The court said that the transfer could not be subjected to tax imposed by more than one state, and cited in support thereof:

Frick v. *Pennsylvania*, 268 U. S. 473, 488, 492;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83, 93;
Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 210;
First National Bank v. *Maine*, 284 U. S. 312, 326, 327.

While three of those cases involved inheritance taxes, as did *Beidler et al. Executors* v. *South Carolina Tax Commission*, 282 U. S. 1, and *Baldwin* v. *Missouri*, 281 U. S. 586, the same principles are applied to property taxes.

Johnson Oil Refining Co. v. *Oklahoma*, 290 U. S. 158;
Brooke v. *Norfolk*, 277 U. S. 27;

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 38;
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 209, 211.

It has been held that the income from real estate is not taxable under the New York income tax law, when the income received by a resident of New York is from land located outside of New York. *Pierson* v. *Lynch*, 237 N. Y. App. Div. 763, affirmed *per curiam* 263 N. Y. 533, *certiorari* dismissed as improvidently granted by this court on November 5, 1934, under title of *Lynch* v. *People of New York ex rel. Piersen*, 293 U. S. 52.

That even intangibles cannot be taxed at the domicile of the beneficiary, the trustee being a non-resident, see *Commonwealth* v. *Appalachian Electric Power Co.*, 159 Va. 462 (1932), certiorari denied 288 U. S. 613, and *Mayor and Council of Baltimore* v. *Gibbs*, — Md. — (171 Atl. 37 [1934]).

III. Ohio Cannot, Consistently with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Tax Some Interests in Real Estate on a Different Basis than It Taxes Others Where There is no Reason for the Classification

It is stipulated that the real estate inside as well as outside of Ohio on which the land trust certificates are issued, has been taxed in the customary way that all real estate is taxed, without deduction for the interest of the land trust certificate holders (R. 59). Under the Ohio Constitution, Article XII, Section 2 (113 Ohio Laws 790; see appendix) "Land and improvements thereon shall be taxed by uniform rule according to value." To tax appellant on his interest in real estate, in addition to the tax paid on the real estate itself, is a discriminatory method of taxation. It is like valuing the property of one person, for pur-

poses of taxation, higher than similar property. This has been held unconstitutional by this Court in *Concordia Fire Ins. Co. v. People of the State of Illinois*, 292 U. S. 535; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23.

In *Concordia Fire Insurance Co. v. People of the State of Illinois*, *supra*, at page 549, the court said:

> "The net receipts which are taxed are not different from those which are not taxed; and both come from the same source. Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary. In principle it is not different with the net receipts. They are property and the tax which section 30 imposes is, as the state court holds, a property tax. It follows that the section, when construed and applied in the way just described, is in conflict with the equal protection clause of the Constitution. Full support for this conclusion is found in prior decisions."

In *Chisholm v. Shields*, 67 O. S. 374 (1902), it was held that the beneficiary could not be taxed, as the trustee had already paid the taxes on the property, though trustee and beneficiary were both residents of Ohio.

IV. It is Unconstitutional Discrimination to Tax Equitable Interests in Land "Divided into Shares Evidenced by Transferable Certificates" and to Exempt from Taxation (a) the Same Equitable Interests When Not Represented by Such Certificates; (b) Legal Interests in Land, Whether Divided into Shares or Not, and Whether Represented by Transferable Certificates or Not.

The land trust certificate the holder receives is merely the evidence of his interest in property, and has no value

in and of itself. It is not negotiable, like a bond or a note, or like a stock certificate in those jurisdictions where the Uniform Stock Transfer Act is in effect. The owner's only right is to receive what the trustee receives, but he has an absolute right to that. Thus his interest is different from that of the stockholder, who has rights as to the corporation itself, but whose rights to receive money or property are ordinarily controlled by the board of directors.

The interest of a land trust certificate holder can only be transferred by a form of conveyance, which might just as well be on an entirely separate instrument as on the certificate itself, except for the convenience of the trustee in recording the transfer. A state has no right to tax evidence of the interest in property, apart from the thing itself. *Selliger* v. *Kentucky*, 213 U. S. 200, *supra*.

The Ohio Supreme Court in *Cassidy* v. *Ellerhorst*, 110 O. S. 535 (1924), held that as Ohio could not levy a tax on the intangible property of a deceased resident of Kentucky, it could not levy such a tax when the evidences of such property, certificates of stock and the bonds, were in a safety deposit box in Ohio. That is, if the property which the certificates evidenced was not in Ohio, then the fact that the evidence of the property was in Ohio gave Ohio no jurisdiction to tax. At page 545, Chief Justice Marshall said:

> "It is a well-settled principle, so far as Ohio jurisprudence is concerned, that the shares of stock are property, but that the certificates are only the evidence of the ownership of those shares, and that they amount to no more than the title deeds of real estate. The certificates are a great convenience, and of great value as evidence, but they are certainly no more than evidence."

The court mentions title deeds of real estate as evidence of title and not as representing the title itself.

See, also, *State* v. *Davis*, 85 O. S. 43, 56 (1911), and *Ball* v. *Towle Manufacturing Company*, 67 O. S. 306, 314 (1902).

What is the basis for distinguishing between equitable interests evidenced by so-called transferable certificates and equitable interests not so evidenced? One class is just as easily transferable as the other. Both require that the transfer be executed with the formalities required for the transfer of an interest in real estate; that is, signature by the owner in the presence of two witnesses, who sign as witnesses, and acknowledgment before a notary public, who certifies to the acknowledgment (R. 72-75, 80-82). Dower must be released to give good title in either case (R. 72).

Suppose a man who had several children and grandchildren were to declare himself trustee for them and write each a letter telling them what he had done and what their respective interests were. Under the terms of the statute, the beneficial interests would not be taxed. Suppose, however, instead of merely writing them a letter, he issued a certificate showing the interest that each had, and in order that they should not make any mistake in case they wished to sell or give away their interest in the trust, on the face of the certificate he gave instructions as to how the transfer should be executed and put a form of transfer thereon. The children and grandchildren would have no different interest in one case than in the other. Yet, under the construction placed upon *Section 5323* of the General Code by the Supreme Court of Ohio, the beneficial interests would be taxed only in the second case. See, *Morrison* v. *Manchester*, 58 N. H. 538, cited in 1926 *Opinions of Attorney General*, 376 and 377, *supra*.

Suppose, again, that this man, in place of declaring himself trustee, conveyed undivided interests to his children and grandchildren, but at the same time took back, as a

condition of the conveyance, an irrevocable power of attorney to manage the property, collect the rents and distribute the proceeds, taking a certain percentage as compensation for so doing. In that case, whether he designated himself trustee or not and whether he issued "transferable" certificates or not, the statute does not tax the beneficial interests. If a lease were made of the property under terms that required the lessee to pay the taxes and the property were listed in the name of the lessee, then the beneficiaries would have no tax to pay.

The owner of land, the title of which is registered under the Torrens Act, gets a certificate from the Recorder (G. C. 8572-23) and transfers his title by an assignment endorsed thereon (G. C. 8572-37). No one would contend this certificate is taxable.

It would be just as logical to say that a person would have to pay an annual property tax on real estate that he received by deed, but would not have to pay a tax on real estate received by inheritance. It is illogical and discriminatory, in violation of constitutional rights, to levy a property tax on property acquired in a certain manner or evidenced in a certain way, when other property, acquired in a different manner or evidenced in a different way, but giving the owner the same property rights, is not taxed.

It has been held that a landlord could not be taxed on capital estimated sufficient to produce an income equal to the net rental of his property, the property being also taxed and the tax paid by the tenant as part of the rental. *Keasard* v. *City of Manchester*, 68 N. H. 61 (1894).

This Court has always held that a classification of property for purposes of taxation, not based on any logical reason, but arbitrarily, is an unconstitutional violation of rights under the Fourteenth Amendment to the Federal

Constitution. For instance, a statute basing a tax on corporations on the gross receipts derived from the operation of taxicabs, which does not tax like receipts of individuals and partnerships, rests on a purely arbitrary basis and is void because it violates the guarantees of the Fourteenth Amendment. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389.

Bank stocks cannot be taxed on a different basis than stocks of other monied institutions performing similar services. *Iowa Des Moines National Bank v. Bennett*, 284 U. S. 239.

The Court of Appeals of New York, in holding a stock transfer law invalid, in *State ex rel. Farrington v. Meusching*, 187 N. Y. 8 (1907), 19, stated:

> "Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.'"

See *Louis K. Liggett Co. v. Lee*, 288 U. S. 517 and *Royster Guano Co. v. Virginia*, 253 U. S. 412.

In *Healy v. Ratta*, 67 Fed. (2d) 554 (C. C. A. 1, 1933), the New Hampshire hawkers' and peddlers' act was held to contain so many discriminatory provisions and unreasonable classifications as to render the entire act void. This act exempted citizens of New Hampshire over seventy years of age from paying any license fees, and there were other discriminatory provisions and unreasonable

classifications. See, especially, pages 557 and 558 of the opinion.

The fact that it is rights that are subject to tax, not evidences of the rights, is further illustrated by two recent cases in Federal Circuit Courts of Appeals, as follows:

In *Reinecke* v. *Kaempfer*, 72 Fed. (2d) 469 (C. C. A. 7, 1934), the court taxed a business trust as an "association" under the Federal Revenue Act of 1924, even though no certificates of stock or of interest in the trust were issued. The fact that it was a management trust was sufficient.

In *Commissioner of Internal Revenue* v. *Guitar Trust Estate*, 72 Fed. (2d) 544 (C. C. A. 5, 1934), the first paragraph of the syllabus reads:

> "Where husband and wife created voluntary trust for benefit of children by donating to trustees for children eight-tenths of their property, reserving to each of themselves only a child's share, and beneficiaries as such had no voice in management of trust and no power to dispose of their beneficial interests or to select their trustees, and trustees were authorized to continue going business, trust estate *held* not 'association' as regards computation of income tax."

The tax in the case at bar purports to tax as an intangible under an expressly labeled intangible or personal property tax act, something that the Legislature itself termed an interest in land. It exempted all other similar interests in land and rents derived therefrom. It sought to tax a specific real property interest only when evidenced in a certain way and not when evidenced in any other way.

In *Smith* v. *Cahoon*, 283 U. S. 553, this court held unconstitutional a state statutory provision which required those who operate motor vehicles on the highways in the transportation of goods for hire to furnish a bond or insurance policy for the protection of the public against injuries

received through negligence in such operation, but which did not apply to those "engaged exclusively in transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products." This court, speaking through Mr. Chief Justice Hughes, said on pages 366 and 367:

> "The constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the State to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' *Air-Way*

Corp. v. *Day*, 266 U. S. 71, 85; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Truax* v. *Corrigan*, 257 U. S. 312, 332, 333; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37."

V. The Ohio Intangible Tax Act Does Not Levy An Income Tax on Land, and If It Did, Such Levy Would Be Unconstitutional As to Appellant

It would not be necessary to argue this question here were it not for the ambiguity created by the language of the second paragraph of the syllabus in the principal case in 128 O. S. 597, the last sentence of which reads:

> "Section 5323, General Code (114 Ohio Laws, 715), does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests."

The next paragraph of the syllabus seems to qualify the sentence just quoted, for it reads as follows:

> "Such certificates represent intangible rights within the purview of Section 5323, General Code (114 Ohio Law, 715), and are taxable as such, notwithstanding the fact that the particular real estate out of which such rights issue is likewise taxed."

This court will determine, in considering the constitutional questions presented, the nature of the tax imposed by the State of Ohio. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, at page 625; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, at page 387; *Lawrence* v. *Mississippi*, 286 U. S. 276, at 280.

If this were an income tax, we submit that it would involve an unlawful discrimination, in violation of the rights guaranteed by the Fourteenth Amendment to the Constitution, inasmuch as the owners of equitable interests in real

estate divided into shares represented by transferable certificates are the only persons in Ohio who are subjected to taxes on the "income yield" in addition to the customary property taxes levied and assessed on the real estate itself.

In *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, this court held that an income tax on the income from land was a direct tax on the land. Mr. Chief Justice Fuller, who wrote the opinion of the court in that case, said (pages 580-581):

> "The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. . . .
>
> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In *Pierson v. Lynch*, 237 N. Y. App. Div. 763, affirmed in 263 N. Y. 533 (cited *supra*), it was held that New York could not tax a resident of that state on rental received by her from real property owned by her and located in Ohio. It is submitted that this decision is correct and that Ohio would not have jurisdiction to tax the income received by one of its residents from rentals from real estate located in another state.

The act in question (114 O. L. 714, *et seq.*), is not an income tax. As has been previously shown, it is entitled

> "An Act providing for the levy of taxes on intangible property at classified rates and for the assessment of tangible personal property for taxation."

The purpose of the act was to impose a property tax on intangible and other personal property, in place of the former uniform tax which was required before the amendment of Section 2 of Article XII of the Constitution of Ohio in 1930, the pertinent part of which formerly read:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money," (3 Page's Annotated Ohio General Code 6550).

The intangible tax is based on "investments," as defined in Section 5323 (114 O. L. 715). "Income yield," not income, was made the basis of taxation, and investments were taxed at five per cent of income yield. Section 5638 (114 O. L. 722).

"Income yield," as used in the act (G. C. 5389):

> "Means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year" (i. e., the tax year).

If income yield, as so defined, were made the basis of an income tax, as distinguished from a property tax, then the act in this respect would be clearly unconstitutional, as neither the State of Ohio nor the Federal Government may impose an income tax on a person based on income

which he does not receive. *Hooper* v. *Tax Commission of Wisconsin*, 284 U. S. 206 (1931). The appellant acquired the East Sixth St., Cleveland, Ohio, land trust certificate on May 29, 1931 (R. 79), after two quarterly installments of rental had already been paid during the tax year (R. 77). The petition was filed in 1932 to enjoin the tax based on the previous year's "income yield" (R. 42-43).

The tax here in question cannot be called an income tax, nor even a gross receipts tax, because it is not based on the income or gross receipts *of the taxpayer*. The conclusion must be that "income yield" was used as a basis for determining a property tax. This is evident from the report of the Special Joint Taxation Committee on the Revision of the Ohio Taxation System. In commenting upon Section 5389, Honorable Robert A. Taft, Chairman of the Committee, in referring to the phrase "income yield," says:

> "'Income yield,' as defined in the second paragraph, means the actual income yield on the investment, whether received by the person who owned it on listing day or not. In other words, the tax is a property tax measured by income yield, and not an income tax on the owner." (See the pamphlet published by The W. H. Anderson Company on the new Ohio Intangible Tax Law, annotation under Section 5389, repeated in Page's Annotated Ohio General Code, Permanent Supplement 1926-1935, page 783.)

In *Friedlander* v. *Gorman*, 126 O. S. 163 (1933), Judge Stephenson, who delivered the opinion for the majority of the court and wrote the opinion in the principal case, said (page 169):

> "The intangible tax is a personal property tax."

Section 5638 shows the intent of the Legislature in imposing property, not income, taxes as follows:

"Classification of intangible property and rate of taxation.

". . . taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated . . . at the following rates, to wit:

'Investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar.' "

The receipt which appellant received for his taxes, lists Classified Personal Property to be taxed, as follows:

"Investment at Income Yield	5%
Investment Unproductive	.2%
Deposits Outside Ohio	.2%
Credits	.3%
Money and Other Taxable Intang.	.3%"

Exhibit 21 (R. 140). This shows that the tax was obviously a property tax and so considered by the taxing officials. It would be an illegal discrimination to levy an income tax on income yield on investments and a property tax on all other intangibles.

The Supreme Court of Ohio attempted to justify the tax on the basis of this Court's decision in the case of *Maguire v. Trefry, Tax Commissioner of Massachusetts*, 253 U. S. 12, 17 (128 O. S. at page 607). In that case, this court upheld the Supreme Judicial Court of Massachusetts in sustaining a Massachusetts income tax on the income received by a *cestui que trust* from *intangible personal property* held by a foreign trustee on which property *the state*

of trustee's domicile had placed no tax. Therefore, the decision in *Maguire* v. *Trefry* is not applicable to our case, in which the tax is a property tax and the trust *res* has already been taxed as real estate. Moreover, it is questionable whether *Maguire* v. *Trefry* is not one of the opinions that was overruled by the decision of this court in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83. See, *Allen* v. *Commissioner of Internal Revenue*, 49 Fed. (2d) 716, 718.

CONCLUSION

Equitable interests in land divided into shares evidenced by transferable certificates are, by *Section* 5323, conclusively denominated interests in land. By settled rules of construction, which had become rules of property before the certificates in question here were issued, equitable interests in land in Ohio had been classed as real property. The certificates representing these interests may not be taxed any more than a deed could be taxed apart from the land it conveys or a warehouse receipt apart from the commodity it represents. As to real property outside the State of Ohio, there can be no question that it may not be taxed by Ohio. Since the land trust certificate holder's interest is an interest in real property, attempted taxation thereof where the property is located outside of Ohio is illegal as taxing real property beyond the jurisdiction of the taxing state. The attempted tax is not an income tax and even if it were, could not be levied only on this one species of property or on income derived from real estate located outside of Ohio.

The real estate in which appellant has an interest has been taxed to the lessor or the lessee for its full value. To tax these particular equitable interests, in addition to the legal interests, when other real estate is not taxed on both,

is double, discriminatory taxation and, therefore, unconstitutional.

To tax, under an intangible and personal property tax law, only equitable interests in real estate divided into shares evidenced by transferable certificates, and expressly to exempt exactly similar interests not so evidenced, and also expressly to exempt similar legal interests evidenced or not evidenced by transferable certificates, is an arbitrary classification depriving holders of such certificates of the equal protection of the laws.

The judgment below should, therefore, be reversed.

Respectfully submitted,

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APPENDIX

Statutes and Constitutional Provisions Cited

Section 2 of Article XII of the Constitution of Ohio (in effect at time in question):

No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the first day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and, without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions, therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law. (113 O. L. 790.)

General Code of Ohio, Section 710-140. A savings bank may invest its funds in:

. . . . . .

(d) Ground rents or certificates of participation or beneficial ownership in improved lands under lease for a period of not less than twenty-five years from the date thereof, and conditioned that the lessee shall pay all taxes and

assessments thereon and keep and maintain said premises in full and complete repair, with insurance in an amount equal to the insurable value of the improvements thereon, provided that the aggregate par amount of such rents or certificates shall not exceed the value of the land nor sixty per cent of the total value of the land and improvements. But nothing in this section contained shall prevent the investment in such rents or certificates in unimproved lands, where by the terms of the lease thereof the construction of a new building thereon is provided for and funds have been deposited or will be deposited from the proceeds of the sale of such rents or certificates sufficient for the cost of such construction, and conditioned that such construction shall begin within six months thereafter and that the funds so deposited shall be paid out to meet the cost of such construction as the work progresses and for no other purpose. (108 O. L., Part 1, 116.)

General Code of Ohio, Section 5322, appears in full at the bottom of page 4 of the brief.

General Code of Ohio, Section 5323. "Investments" defined.

The term "investments" as used in this title, includes the following:

Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by chapter four of this title, and (3) such as are defined in this chapter as "deposits."

Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this state yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or

not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the federal government, or (3) prior to the first day of January, 1913, by the State of Ohio or any political or other subdivision or school district in this state and (4) bonds of the state of Ohio issued pursuant to article VIII, section 2a of the constitution of Ohio and (5) such as are defined in this chapter as "deposits" and "current accounts."

Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located.

When any corporation provides and carries out a plan for the allotment and sale of any or all of its unissued shares, or of shares purchased or to be purchased, to the employees of the corporation or to the employees of subsidiary corporations or to a trustee on their behalf, and for the payment of such shares in installments or at one time, and for the establishment of a special fund or funds in which such employees during the period of their employment or other period of time may be privileged to share on such terms and conditions as may be imposed in respect thereof; the relationship between the corporation or the trustee, if any, and each employee shall, for the purpose of determining the tax upon the shares concerned or upon any interest in them, be deemed to be a trust, and any tax upon the said shares or any interest in them shall be levied and assessed accordingly. (114 O. L. 715.)

General Code of Ohio, Section 5328. Property to be entered on general tax list and duplicate. All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title. (114 O. L. 717.)

General Code of Ohio, Section 5388. Rules for listing and assessing personal property.

Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at the true value thereof, in money, on the day as of which the same are required to be listed.

Personal property of the following kinds, used in business, shall be listed and assessed at fifty per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be:

(1) All engines, machinery, tools and implements of a manufacturer mentioned in section 5386 of the General Code, and all engines and machinery of every description used, or designed to be used in mining, and all tools and implements of every kind used, or designed to be used for such purpose, excepting or provided in the last paragraph of this section, and all engines, machinery, tools, implements and domestic animals used in agriculture.

(2) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining; the average value of all articles which were at any time by him manufactured or changed in any way, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith; and agricultural products on farms.

Boilers, machinery, equipment and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing the same shall be listed and assessed at the true value thereof in money, on the day as of which they are required to be listed, anything in this section to the contrary notwithstanding. (114 O. S. 720.)

General Code of Ohio, Section 5389. Application of term "true value in money"; "income yield" defined.

As used in section 5388 of the General Code and elsewhere in this chapter, the "true value in money" of any property means the usual selling price thereof at the time or times and place as of which it is required to be listed;

but if there is no usual selling price known to the person whose duty it is to fix a value thereon, then, such price as is believed could be obtained therefor in money, at such time or times and place. In the case of personal property used in business, the book value thereof, if any, less book depreciation, at such time or times, shall be listed and such depreciated book value shall be taken to be the true value of such property, unless the assessor shall find that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from depreciated book value must be made in writing by the taxpayer at the time of making return; and when such return is made to the county auditor and required by this chapter to be transmitted to the commission for assessment, the county auditor shall, as deputy of the commission, investigate such claim and shall enter thereon, or attach thereto, in such form as the commission may prescribe, his findings and recommendations with respect thereto; when such return is made to the commission such claim for deduction shall be referred to the auditor of each county wherein the property affected thereby is listed, as such deputy, for investigation and report.

"Income yield" as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

In the case of an obligation bearing interest, the amount of interest separately charged and paid during such year, if any, exclusive of payments on the principal; in the case of shares of stock, the cash dividends so paid; in the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per centum of half of the principal used to purchase the same, or, if there be no such principal, four per centum of half of the present worth of such payments if commuted, which shall be calculated, as of the date on which such investment is required by this chapter to be first listed, with interest at four per centum per annum and, in the case of annuities for life or lives,

according to the Combined Annuity Four Per Cent. Table; in the case of equitable interests, the cash distributions of income so made. At the request of the commission or of any county auditor, the superintendent of insurance shall, upon being furnished with a statement of the facts, compute upon a basis equivalent to that herein prescribed, the income yield of any investment as to which the interest is not charged and paid separately from the principal thereof, and the assessor shall be governed by the computation so made. (114 O. L. 721.)

General Code of Ohio, Section 5638. Classification of intangible property and rate of taxation.

For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to-wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar. (114 O. L. 722.)

General Code of Ohio, Section 11590. (3 General Code of Ohio, 1910, page 2840.) When judgment to operate as a conveyance.

When the party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably thereto.

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No. 658

Supreme Court of the United States

OCTOBER TERM, 1934

MAX SENIOR,

Appellant,

v.

GEORGE C. BRADEN, ET AL.,

Appellees.

REPLY BRIEF FOR APPELLANT

I. THE DECISION OF THE OHIO SUPREME COURT DOES NOT PREVENT REVIEW BY THIS COURT OF THE FEDERAL QUESTIONS PRESENTED

The decision of the Ohio Supreme Court is conclusive that *Section 5323* in terms taxes equitable interests in real estate divided into shares evidenced by transferable certificates. But the question remains for this Court's decision: is the statute so taxing them constitutional?

If the Attorney General is correct in his contention that the decision of the Ohio Supreme Court is final as to the nature of the interest taxed and what is taxed, then he is

"hoist with his own petard"; because, in that view, *Section 5323* is an unconstitutional gross receipts tax. The second paragraph of the syllabus (which, as we have shown [Brief 20] is the law of the case in Ohio) reads (R. 169, top):

> "2. Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Section 5323, General Code (114 Ohio Laws, 715), does not provide for a tax against equitable interests in land but does provide a tax against the income derived from such equitable interests."

This makes *Section 5323* plainly unconstitutional as to appellant, for the following reasons:

1. It is an income tax on the entire income yield for the year, part of which was not received by appellant. *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206.

2. A tax against the income derived from equitable interests in land is, in substance, a tax on the equitable interests in land themselves, *Pollock* v. *Farmer's Loan & Trust Company*, 157 U. S. 429; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 16, and, therefore, subject to the constitutional infirmities we have pointed out on the assumption that the tax is on equitable interests in land, whether such land be located in or outside of Ohio.

In *Boettcher* v. *Boettcher*, 48 Oh. App. 319, 321 (7 Ohio Bar No. 44 (Advance Sheets, January 28, 1935), the same Court of Appeals which decided the case at bar, said:

> "We are of opinion that the law is well settled that a devise of the income from real estate during life is in effect a devise of a life estate in the realty. This in effect is holding in the case of *Isherwood* v. *Isherwood*, 16 C. C. 279, 8 C. D. 409, and cases therein cited. This rule is also pronounced in 28 Ruling Case Law, 239, and cases there cited, and in 40 Cyc. 1536. We know of no holding to the contrary."

8. It is not permissible to tax equitable interests in land divided into shares evidenced by transferable certificates on the basis of income yield in addition to full taxation of the legal title, and not to tax, except on the legal interest:

(a) Legal interests in land.

(b) Legal interests evidenced by transferable certificate but not divided into shares, e. g., registered titles and the Recorder's Certificate. (G. C. Ohio § 8572-23.)

(c) Legal interests divided into shares but not evidenced by transferable certificates.

(d) Equitable interests evidenced by transferable certificate but not divided into shares.

(e) Equitable interests divided into shares but not evidenced by transferable certificates.

It is apparent and does not require evidence to show that these various interests not taxed on income yield are substantially identical with the equitable interests taxed, according to the Ohio Supreme Court's decision, on income yield.

Hence, as before stated, if *Section 5323* is conclusively, because of the Ohio Supreme Court's decision, an income tax on income yield, it is unconstitutional. Appellees do not, anywhere in their brief, however, assert or try to establish that *Section 5323* is an income tax. Their whole brief is on the assumption it is a property tax. Thus, for example, point VIII of their brief (p. 50) is headed:

> "THE INTANGIBLE TAX LAW OF OHIO IMPOSES A TAX UPON THE EQUITABLE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS UNDER CONSIDERATION HEREIN."

Again, as to the Ohio Supreme Court opinion, the first sentence of the second paragraph of the syllabus is to the effect that the holder of the land trust certificates named in the first paragraph of the syllabus is:

"the owner of equitable interests in real estate divided into shares evidenced by transferable certificates." (R. 169, top.)

No portion of the syllabus is more conclusive than any other; so we have a right to assert that the above quoted portion of the second paragraph of the syllabus conclusively establishes that the holder of the land trust certificates involved in this case is the owner of equitable interests in real estate. How can our opponents assert that the decision of the Ohio Supreme Court is conclusive as to the nature of the property sought to be taxed and yet dispute that portion of the opinion which says in terms the holder is the owner of equitable interests in real estate?

It is true the third point of the syllabus (R. 169) says the certificates represent intangible rights within the purview of *Section 5323* and are taxable as such; but the third paragraph is apparently inconsistent with the second paragraph and is entitled to no greater effect. Indeed, it should be regarded as less valuable, because the first sentence of the second point of the syllabus is supported and compelled by previous decisions of the Ohio Supreme Court as to the nature of equitable interests in real estate which opinions are not even mentioned by the Ohio Supreme Court in the case at bar, much less overruled. This Court may, then, itself determine the essential nature of certificates of equitable interests in real estate divided into shares evidenced by transferable certificates. It will also determine their *situs* for taxation. *Beidler* v. *South Carolina Tax Com.*, 282 U. S. 1.

II. THE LAND TRUST CERTIFICATES INVOLVED ARE MERE MUNIMENTS OF TITLE TO INTERESTS IN REAL ESTATE LOCATED IN OHIO, ILLINOIS, MASSACHUSETTS AND NEBRASKA

A. The taxing statute, Section 5323, denominates them "interests in land."

The brief of appellees erroneously states (pp. 2 bot.-3) that *Section 5323* defines investments

> "so as to include incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, including equitable interests divided into shares evidenced by transferable certificates; . . ."

That this summary is wrong is shown by comparison with the actual reading of the statute in the note immediately following. The statute taxes

> "all contractual and other incorporeal rights, . . . excepting . . . (2) interests in lands and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates. . . ."

When the statute says "interests in lands" are excepted, save equitable interests divided into shares, etc., the exception to the exception must be of the same class as the exception. You cannot except something from something entirely different. It would not make sense to say:

> "All tangible property excepting intangible property shall be taxed."

Grammar and sense require the reading of *Section 5323* to be that equitable interests in land divided into shares evidenced by transferable certificates are interests in land.

These equitable interests are then certainly denominated interests in land by the statute and the designation of them as such in the taxing statute itself is entitled to very great weight. The statute in terms excepts all other interests in lands and rents and royalties derived therefrom, whether equitable or legal.

B. Ohio law has been, for almost a hundred years, definitely that equitable interests in land are real estate.

From cases cited in our brief (pp. 19-20) it is plain that equitable interests in land descend as real estate, are subject to sale for the payment of debts whenever legal interests in real estate are so subject and may be levied on by execution. By Ohio statute (*Section 11590*) also, a decree of court operates as a conveyance of defendant's title. Moreover, in Ohio, the contract purchaser of real estate, i. e., the equitable owner, is liable for loss of improvements on the property although the legal title is in the seller (Brief p. 18).

These decisions were urged on the Ohio Supreme Court, as were the opinions of the Attorney General and cases therein cited, referred to in our brief (pp. 15-17). As before stated, the Supreme Court did not refer to, much less attempt to distinguish or overrule any of these former decisions, and they must be regarded as still the law of Ohio. Our opponents dispose of this matter somewhat jauntily, as follows:

> "nor is the matter of descent involved herein. The issue is solely as to the nature of the interest of the beneficiary for purposes of taxation." (Their brief, p. 45.)

But the nature of the property is shown by the fact that it descends to the heir and has been treated as real estate for many years by Ohio decisions and officials.

III. APPELLANT BOUGHT, WHEN PURCHASING THESE LAND TRUST CERTIFICATES, INTERESTS IN REAL ESTATE

In the first place, his certificates and the declarations of trust therein referred to state, in substance, he was acquiring interests in real estate. The certificate for the Lincoln Inn Court ground rent (Exh. 1) recites that he

> "purchased and paid for an undivided interest in said premises" (R. 65, bot.)

and that he

> "is the owner of an undivided 340/1275ths interest in the premises described in said lease . . ." (R. 66, top) "and that at any time on demand The Title Guarantee & Trust Company will deliver special warranty deeds for undivided interests in said premises, . . ." (R. 66).

In the Declaration of Trust (Exh. 9) the Trustee agrees to convey to holders

> "by special warranty deed the proportionate part of the fee simple title to said property to which their certificates may entitle them" (R. 86).

As to the Illinois property, appellant's purchase is designated:

> "Land Trust Certificate of Equitable Ownership in the Clark-Randolph Building Site, located in Chicago, Illinois" (R. 67, bot.)

and certifies that appellant is registered as the owner of a fraction

> "of the equitable ownership and beneficial interest in certain property located at the northeast corner of Clark and Randolph Streets, Chicago, Illinois . . ." (R. 67 bot.-8.)

and that title is held by the Trustee for the benefit of holders of

> "Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (R. 68).

The title certificate shows (R. 72):

> "at the date thereof, there are no conveyances, liens, judgments or pending suits of record . . . which affect the equitable interest evidenced by the land trust certificate."

followed by (R. 72):

> "Note: After a transfer of this Land Trust Certificate has been made, a new examination of the title will be made as of the date of recording such transfer and a new title certificate will be executed upon the new Land Trust Certificate, which will show the condition of the title as disclosed upon such examination.
>
> "Note: This transfer deals with an interest in Illinois real estate. If the holder hereof is married, the spouse should also execute and acknowledge this transfer . . ."

and by a form of conveyance showing the grantor is

> "owner of the entire beneficial interest represented by said Certificate in the premises described . . . to have and to hold the same unto the grantee forever; and the grantor covenants that he has not encumbered or permitted to be encumbered the undivided interest hereby transferred.
>
> "The undersigned, spouse of the grantor, for a valuable consideration hereby remises and releases to the grantee all right and expectancy of dower in said premises.
>
> "The undersigned hereby authorizes said Trustee . . . to have this conveyance recorded in the Recorder's Office . . ." (R. 73).

The form of conveyance and acknowledgment are similar to those used for deeds and the note following (R. 74) shows execution of the above instrument of transfer must be acknowledged before a Notary Public or other officer authorized to take acknowledgments of deeds.

In the Declaration of Trust (Exh. 10), Article II (R. 97), says:

> "The equitable ownership and beneficial interest in the Trust Estate is divided into three thousand two hundred and fifty (3,250) indivisible equal shares, (each share representing 1/3250th part of the equitable ownership of said trust estate)."

and that the certificates issued by the Trustee to Pohl evidence

> "the entire equitable ownership of said trust estate" (R. 97).

In Article VI the interest of the beneficiary is described as "being an equitable estate only" (R. 106).

From Article VIII we quote:

> "Land Trust Certificates and the equitable interest in the trust estate evidenced thereby may be transferred and conveyed in full shares, . . ." (R. 108)

and that the Trustee will file for record with the Recorder of Deeds of Cook County, Illinois, the writing evidencing each such transfer and will employ a title company to make a search of the court records of such county

> "and to report as to the existence of any liens, conveyances, encumbrances, judgments and/or pending suits of record (except taxes, assessments and existing liens) affecting the equitable interests so transferred, . . ." (R. 109).

Article XIV provides, in case of termination of the trust, other than by the exercise of the privilege of purchase

> "distribution shall be made by the Trustee in kind by conveyance of the Trust Estate in undivided legal interests, or, at the election of the Trustee, by sale and distribution of proceeds as in this Declaration provided" (R. 115-16).

The certificate of ownership of the Cleveland property (Exh. 7) is entitled:

> "Land Trust Certificate of Equitable Ownership in property located on East Sixth Street, Cleveland, Ohio . . ." (R. 75)

and certifies that:

> "Max Senior is the owner of six one-thousand-and-fiftieths (6/1050ths) of the equitable ownership and beneficial interest in certain property located," etc.

and that the certificate is:

> "issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (R. 75).

The form of assignment (R. 79-80) recites that the undersigned

> "being the owner of a portion of the beneficial interest in the premises described in said Agreement and Declaration of Trust, as evidenced by the within Certificate, does hereby for a valuable consideration sell and convey to . . ., his heirs and assigns forever, absolutely and in fee, the within Certificate and all interest therein and in said premises, . . ." (R. 80).

The form of acknowledgment is that used in Ohio for a deed (R. 80-1) and the note (R. 82) says that

> "it must be acknowledged before a Notary Public or other officer authorized by the laws of the State of Ohio to take acknowledgments of deeds, . . ." (R. 82).

The Declaration of Trust (Exh. 19) is with

> "The Holders of Land Trust Certificates of Equitable Ownership in Property Located on East Sixth Street, Cleveland, Ohio, etc." (R. 117).

Article I refers to "Certificates of Equitable Ownership" (R. 118, top).

Article II says "The equitable ownership and beneficial interest in the Trust Estate is divided into ten hundred and fifty (1050) indivisible equal shares" (R. 121).

Article XIII refers to:

> ". . . a new Land Trust Certificate or Certificates representing the number of shares of equitable ownership in the Trust Estate . . ."

When Mr. Senior bought his land trust certificates, the Attorney General of Ohio had rendered his opinion (Brief, 15) that such certificates represent interests in real estate; and that as to those outside of Ohio, the purchase was

> "a sale of foreign real estate . . ." (Brief, 17).

Section 710-140 (Brief, 49, bot.) designated these as

> "certificates of participation or beneficial ownership in improved lands . . ."

Mr. Senior, therefore, according to the certificates and declarations of trust he received and the statutes and rules of law in Ohio, acquired interests in real estate.

IV. THE OHIO SUPREME COURT IN ITS OPINION IN THE CASE AT BAR MISCONCEIVED THE NATURE OF EQUITABLE INTERESTS IN REAL ESTATE

As to the Lincoln Court Building certificate, appellant owns 340/1275ths or almost one-fourth of the total ownership and is entitled at any time on demand (R. 66) to a deed for his undivided interest in the premises, subject to the perpetual lease. This indicates strongly that his interest is very close to a legal interest in real estate subject to a perpetual lease. That he had not actually demanded a deed on tax listing day is not, as the Court argues to the contrary (R. 176), unimportant. Being entitled to a deed on demand shows the nature of his interest and that it is an interest in real estate.

The Court, however (R. 175), tries to make a point that he would get only a special warranty deed (R. 175, bot.) apparently unmindful of the fact that trustees' deeds are almost always of that character. Williams's, Real Property, 24 ed. (1926) 734; 65 C. J. "Trusts" 779, sec. 650.

The Court then argues (175, bot.-6) that if Senior got a deed all that he could get, having received a deed, would be money. We do not know how, in the absence of evidence on the subject, the Court undertakes to say (R. 176, top):

> "It never was intended by the creators of the trust that Senior should at any time have any of the land in question, and Senior never expected it."

The court is plainly wrong and unmindful of the statutes of Ohio relating to partition, when asserting that in the event of partition proceedings (R. 175, bot.):

> "An appraisement would be returned, property sold, and all that Senior could get would be 340/1275ths of the net selling price of the land in money."

On the contrary, *Section 12033*, Ohio General Code, provides for amicable partition and:

> "In such cases and in all cases where the lands are divided by the commissioners among the parties, the court shall order the sheriff to execute and deliver to each person entitled thereto a deed for the portion set off and assigned to such person."

and by *Section 12034*, when the estate cannot be divided without manifest injury to its value, the commissioners return that fact to the Court with a just valuation of the estate and

> "thereupon if the court approves of the return, and one or more of the parties elects to take the estate at such appraised value, it shall be adjudged to him or them, upon his or their paying to the other parties their proportion of its appraised value, according to their respective rights, or securing it. . . ."

By *Section 12037*, unless the Court, by special order, directs the entire payment to be made in cash, the purchase money is payable one-third on day of sale, one-third in a year and one-third in two years thereafter, with interest.

So that the Court's observations with respect to appellant's almost one-fourth ownership of the Lincoln Inn Court property and his right to a deed therefor at any time, that all he can get as a result is money, is clearly incorrect and it is not at all inconceivable that he might choose to get a deed, institute partition proceedings and acquire the remaining fraction at the appraised value.

Again, the Court is obviously wrong in saying that these land trust certificates are

> "tantamount to stock certificates in a corporation" (R. 179)

and that the plan is not carried out in corporate form as a subterfuge to escape taxation (R. 178, bot.-9). Here,

also, the Court is unmindful of Ohio statutory law existing at the time these equitable interests in real estate were sold. Until the Intangible Tax Law was passed in 1931 it was expressly provided by *Section 192* that a stockholder in an Ohio corporation was not required to pay taxes on his shares and that a stockholder in a foreign corporation was also not required to pay taxes if the corporation paid the same as the domestic franchise tax, as follows:

> "SEC. 192. (Listing of corporate stock for taxation.) No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation provided such corporation, for the privilege of exercising its franchise in Ohio, elects to pay and pays annually a franchise tax at the times, in the manner, on the basis and in the amount prescribed by law for domestic corporations."

Moreover, the differences between land trust certificates and shares of stock are so plain and have been pointed out so often that we shall not take space to refer to them.

The Court relies on *Maguire* v. *Trefry, Tax Commissioner*, 253 U. S. 12, 17, but that case is readily distinguishable since:

1. This Court was not dealing there with the right to tax securities which had acquired a local situs (p. 16);

2. The Massachusetts statute by its express terms (p. 13) exempted securities directly taxable to the trustee; and

3. The trust *res* was securities consisting of notes, stocks and bonds, etc. (p. 13), not, as here, real estate and the tax was an income tax.

It appears from the report of the case in 230 Mass. 503, both that the trust was of securities which had not acquired a local situs (p. 504) and that some of the securities

in the trust were taxed to the trustee in Pennsylvania and were, therefore, by the very terms of the statute not taxed in Massachusetts. The Massachusetts decision says (p. 513) the statute was passed in the interest of interstate comity and manifestly aimed to avoid duplicate taxation upon the same property in different states. In the case at bar, however, it is stipulated that the trust *res*, land, is taxed at its full value to the trustee, with no diminution for outstanding equitable interests (R. 59).

Finally, the Ohio Supreme Court cited well-known cases (p. 177 bot.-8) to the effect that land is not property, but the subject of property, and that the term property in its legal significance means only the rights of the owner in relation to it.

This is true of legal interests in land as well as of equitable interests. If property in land is to be taxed because it signifies rights in connection therewith, this would necessarily lead to the taxation of all property rights in land, legal or equitable. The only difference between legal and equitable interests in land is that, while both are rights in relation thereto, the former are worked out directly and the latter through the trustee. The beneficial enjoyment is the same.

The Ohio Supreme Court, in the present case, did not intend to hold that the making of a ninety-nine year lease, renewable forever, changed the nature of the interest held by the owner of the fee simple from real state to intangible personal property in the nature of a chose in action. Subsequent to the decision in the instant case, in *Tax Commission* v. *Jacobs*, 129 O. S. 216, decided on February 20, 1935 (advance sheets of the Ohio State Bar Association Report for February 25, 1935), the Court ruled:

> "For inheritance tax purposes an undivided one-half interest in fee simple estates subject to 99-year leases, renewable forever, should be appraised as real estate at its actual market value as of the time of

> accrual of the tax, as provided in Section 5341, General Code, and not by a capitalization of the annual rental income as prescribed in Section 5342, General Code."

If the right to receive rents in perpetuity had changed the character of the property from realty to personalty, then it would have been proper to capitalize the income, rather than to value the property as real estate, without regard to the capitalization of the annual rental income.

The privilege of purchase does not work an equitable conversion of the real estate into personalty until the privilege is exercised. *Smith, Admr.*, v. *Loewenstein*, 50 O. S. 346.

In *Dana* v. *Treasurer and Receiver General*, 227 Mass. 562, the Court said, with reference to the Duluth and Gladstone real estate trusts, *in which the decedent's equitable interest was held to be realty* (page 572):

> "It was provided that the real estate remaining unsold at the end of twenty years should be sold and the proceeds divided . . . But in such a case no conversion takes place until the date when the sale is directed to be made and at Mrs. Dana's death her interest as a holder of one undivided fourth of the land in Duluth was an interest in real estate outside the commonwealth and so not subject to a tax in Massachusetts."

In *Baker* v. *Commissioner of Corporations and Taxation*, 253 Mass. 130, Chief Justice Rugg speaking for the Court said (page 134):

> ". . . When a definite time is specified in an agreement between parties for the sale of real estate and its conversion into personalty, the conversion commonly does not take place until that specified time has arrived. . . ."

The provisions in the respective declarations of trust that certain acts may be done only with the written consent

of the owner or owners of three-fourths of the outstanding shares into which the real estate had been divided would not change in any way the nature of the certificate holder's property right. *Crocker* v. *Malley*, 249 U. S. 223, 233; *Williams* v. *Milton*, 215 Mass. 1, 10.

V. CASES CITED IN APPELLEES' BRIEF CONSIDERED

The cases that counsel for appellees cite, to support their statement that the combination of rights which the appellant possesses, constitutes his property right in the land trust certificate personalty, do not bear out this statement (brief of appellees, page 35). *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, merely held that a state has the right to impose an income tax on the net income of its own citizens derived wholly from activities carried on by them outside the state even though corporations are exempt from such taxes. There was no question of taxing income from land in that case. On the question of discrimination, the Court pointed out that the Federal Government had adopted different systems of taxation for corporations and individuals and that there was no reason why the state should not do the same.

Dana v. *Treasurer and Receiver General*, 227 Mass. 562, is an authority in our favor as the Court held that Massachusetts could not tax a trust consisting of foreign real estate (see pages 571, et seq.). *Priestley* v. *Treasurer and Receiver General*, 230 Mass. 452, is also an authority in our favor. See the opinion concerning the Warren Chambers trust beginning at the bottom of page 454. In *Estate of Stephenson*, 171 Wis. 452, beginning at page 460, it appears that the Isaac Stephenson Company Trustees was a trust created in 1912 by the stockholders of the I. Stephenson Company, a Michigan corporation, which had a capital stock of eight hundred thousand dollars divided into eighty

thousand shares of the par value of ten dollars each. In the trust the stockholders were called certificate holders, and held certificates of parts in number and par value equal to the number and par value of their shares of stock. (But, in the instant case the trust certificates have no par value.) Five trustees were created, and they were required to carry on the lumber operations and general business of the former corporation during the lives of two of the certificate holders or the survivor, unless sooner terminated by a two-thirds vote of the certificate holders, each part being entitled to one vote. The certificate holders also had the right to remove and appoint trustees as well as terminate the trust at any time. (None of these rights inheres in the land trust certificate holders in the instant case.) The trust property, at the time of Stephenson's death, consisted of both real estate and personal property, though chiefly real estate. It was provided that upon the termination of the trust the real estate should vest in the I. Stephenson Lumber Company, a Wisconsin corporation. There were provisions making the certificates assignable, not conveyable as a deed, and for descent to the executors, administrators or assigns of a deceased certificate holder. It is obvious that this was a business management trust. The Court, therefore, followed the decisions in the parts of the *Dana* and *Priestley* cases, cited *supra*, which referred to business trusts, and not the parts of those cases that referred to pure land trusts. The Wisconsin Court recognized that its decision was in conflict with *Bartlett* v. *Gill*, 221 Fed. 476. It did not refer to the affirmance of that case by the Circuit Court of Appeals for the First Circuit in *Gill* v. *Bartlett*, 224 Fed. 927.

We still assert, therefore, that there is no decided case, outside of the instant one, that has held that where only real estate was held in trust, on terms similar to the trusts in the instant case, that it may be taxed by a jurisdiction

other than that in which the land lies. Every case in which the question has squarely arisen, except the instant one, has denied the foreign state the right to tax the equitable interest in the land.

In 1 Cooley's Blackstone, 3rd Edition, Book II, page 336, *337, the Blackstone text says:

> ". . . the courts now consider the trust estate . . . as equivalent to the legal ownership, governed by the same rules of property and liable to every charge in equity, which the other is subject to in law . . . The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestuy que use* is generally in possession of land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments . . . to forfeitures, to leases and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower more from a cautious adherence to some hasty precedents than from any well grounded principle . . ."

In the instruments being considered in the present case, the trustee cannot convey to a purchaser without notice and defeat the equitable title, because the Declarations of Trust are recorded.

Speaking of the Statute of Uses, the same learned author says at page 330, Book II, Chapter 20, *333, that it

> "executes the use . . . ; that is, it conveys possession to the use and transfers the use into possession; thereby making *cestuy que use* the complete owner of the lands and tenements, as well at law as in equity.
>
> "The statute . . . turned the interest of a *cestuy que use* into a legal instead of an equitable ownership."

The Statute of Uses is in effect in Illinois.

Cahill Ill. Revised Statutes 1931, Chapter 30, Section 3, provides as follows:

Conveyance to use—Title vests in beneficiary.

"Sec. 3. Where any person or persons stand or be seized, or at any time hereafter shall stand or be seized of and in any . . . lands . . . rents . . . or other hereditaments to the use . . . or trust of any other person or persons or of any body politic by reason of any . . . agreement . . . or otherwise, by any manner or means whatsoever, in every such case all and every such person or persons and bodies politics that have or hereafter shall have any such use . . . or trust, in fee simple . . . shall from thenceforth stand and be seized, deemed and adjudged in lawful seizen, estate and possession of and in the same . . . lands . . . rents . . . and hereditaments, with their appurtenances, to all intents, constructions and purposes in law of and in such like estates, as they had or shall have in use . . . or trust of or in the same; and that the estate, right, title and possession that was or shall be in such person or persons that were or hereafter shall be seized of any lands . . . or hereditaments, to the use . . . or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him, her or them that have or hereafter shall have such use . . . or trust . . ."

It is stipulated (R. 183, bot.-4) that the decision of this Court with respect to the Illinois land trust (Ex. 2, R. 67) should be applied to the other certificates of equitable ownership in real estate outside of Ohio.

As before stated, the certificate shows in terms (R. 72):

"it deals with an interest in Illinois real estate."

The brief concedes (p. 20):

"that under the Fourteenth Amendment to the Constitution of the United States, the state of Ohio has no power to tax land or interests in land situate beyond

its borders; nor has it power to tax land or interests in land situate within the state in any other manner than by uniform rule according to value, under Article XII, Section 2, of the Constitution of Ohio. From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land or an interest in land, situate within or without the state, their action is unconstitutional and should be permanently enjoined."

As shown in our main brief (pp. 21-23), this Court decided in *Brown* v. *Fletcher*, 235 U. S. 589, that an equitable interest in a trust estate *is property of the same nature as the property held by the trustee*, and not a mere chose in action. Counsel for appellees attempt to distinguish that case (brief, p. 42) by saying that the trust had terminated at the time the suit was brought and the beneficiary was, therefore, entitled to possession. This claimed "distinction" is, however, untenable, and the Court's ruling did not take it into account. The assignments of the equitable interest were made in 1901 and 1902 *when the beneficiary was entitled to income only.* He was not entitled to the principal until 1913. The Court was, therefore, construing the nature of the *cestui que trust's* right *at the time of the assignments*, over ten years before his right to possession accrued.

The appellant's rights in the trusts are the same as those of the assignor in *Brown* v. *Fletcher*.

Counsel criticize unfavorably our selection of text, treatise and law review articles on the nature of the interest of the *cestui que trust* (brief, p. 43), and then proceed to cite, as a persuasive text writer, *Hohfeld, Fundamental Legal Conceptions*, 1923, especially page 96 (brief, p. 47). Pursuing the subject in Hohfeld ten pages further (p. 106), the author disapproves of the reasoning of those who hold the view that because the remedy is *in personam*,

therefore the right is only *in personam*. He then points out the numerous rights that an equitable owner has that are of the nature of rights *in rem*, if the trust *res* is land.

In *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 504, cited appellees' brief, page 46, the question was whether land owners could hold a railroad liable for cutting away a ridge, not on their land, which formed a barrier protecting their lands against the waters of the river in the times of floods and freshets. The railroad defended on the ground that it complied with the law and acted in a careful manner. The Court held that the railroad was liable for the damage to the continued use of the land in its natural state, irrespective of whether it was negligent or not. It was in this connection that Judge Jeremiah Smith made the statements quoted in appellees' brief.

A natural corollary of the right to use property, which is one of the rights of possession, is the right to let others use it. One does not part with property in a chattel when one loans it to another. No more does one part with property and real estate when one leases it to another. Without the right to possession and use a lease would not be possible. To refrain from using one's property or to permit another to use it, on agreed terms, is as much an attribute of property, as to use it oneself. Appellees argue that since appellant could not use the Clark-Randolph land and building on January 1, 1932, this is proof that his rights were exclusively personal. But in the case of any real estate which is subject to a long term lease with privilege of purchase, the owner of the fee simple title, so long as the lessee is not in default, has no right to use the land or building so leased, but only the right to receive the rentals called for by the lease. The argument of counsel for appellees, if carried to its logical conclusion, would mean that the owner of any ground rent was not the owner of real estate, but an owner of what opposing counsel are pleased to call

"congeries of rights" and "bundles of equitable choses in action."

It is difficult to see what logic there is in saying that one parts with one's property by placing it in trust, retaining all the beneficial fruits of ownership. Suppose appellant had owned outright all of the properties in question. If he had made the leases himself he would not have parted with the property, though he parted with the present use in return for a fixed annual income. If he had put his property in the hands of an agent for management, he would still be the legal owner. Where, then, is the essential difference if he calls the agent a "trustee" and makes the "agency" irrevocable so long as the "agent" acts faithfully in accordance with the terms of the agreement? Since "taxes must follow realities" (*Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 286, quoted in appellees' brief, page 38), this is the reality, and it is the appellees who are grasping at shadows.

Counsel for appellees (brief, p. 45) attack the Restatement of the Law of Trusts as merely stating the views of Professor Scott and his associate reporters. The Draft Restatement quoted in our main brief (p. 31) was first promulgated in 1930 and has not been changed. We now have the "Proposed Final Draft" for the approaching meeting and Section 126 remains unchanged. It is in accordance with all the decided cases in the United States to date, except the instant one in the Supreme Court of Ohio. The Restatement by the American Law Institute is supposed to be authoritative. It will not accomplish its purpose and rescue the courts and the practicing lawyer from the welter of conflicting decisions if it is rejected, *in limine*, though supported by the overwhelming weight of authority.

Counsel for appellees (brief, p. 45) cite as against the Draft Restatement of the Law of Trusts by the American Law Institute the testimony of Professor Richard Powell

of Columbia University Law School in *Archer-Shee* v. *Garland* (1931), A. C. 212, 218. Professor Powell was testifying in that case only as to the law of New York State, which is not involved in this case. The report does not show that he cited any court decisions, text writers or other authorities for his statement. The House of Lords felt constrained to follow his opinion regarding the nature of the equitable right in a New York trust, because no testimony was offered to the contrary.

The opinion given by him was, however, directly contrary to the English law laid down by the House of Lords only four years before in *Baker* v. *Archer-Shee* (1927), A. C. 844. In that case the attempt was to tax Sir Archer-Shee for the income of his wife from a trust left in the will of her father, Mr. Alfred Pell, of New York. He had created a trust with a trust company in New York. The net income from the trust was deposited by the trustee to Lady Archer-Shee's account with J. P. Morgan & Company and it was never remitted to England. The law of England at that time was such that if the income was construed as arising from the specific investments which constituted the trust fund, it would be taxable, whether remitted to England or not, but if it was not from the specific investments, then it would not be taxable. This raised directly the question whether Lady Archer-Shee's equitable life interest in the trust was an interest in the securities held by the trustee, or was merely a right against the trustee in the nature of a chose in action such as counsel for appellees claim appellant has here. The House of Lords rejected the latter contention. Lord Carson stated the opinion of a majority most succinctly on page 870, saying:

> "In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interests and dividends of all the securi-

> ties, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends."

Lord Tomlin in the later 1931 case, also pointed out (p. 222 bot.) what amounts to a clear difference between the trust there considered and the trusts in the case at bar. In the *Archer-Shee* case the trustee could apply the income of the property for the benefit of the *cestui* in its reasonable discretion instead of paying it over to her. In the trusts involved in our case, the trustee has no discretion at all and must pay over the rentals to the persons entitled thereto. It is immaterial that the trustee first takes out its charges. That is a matter of convenience, only, and the charges might have been collected instead from the beneficiaries after the rentals were remitted in full. Also, one property, land only is involved in each trust; not, as in the *Archer-Shee* case, a number of securities.

In *Burgess* v. *Wheate*, 1 Eden 177 (1759), Lord Mansfield said (pp. 223 and 224):

> "The *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through or under them, or in consequence of their estates), as the ownership or legal estate, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate.
>
> . . . . . .
>
> "Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by imitation. Every thing I have heard, read, or thought of since, has confirmed that principle in my mind."

In *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, at page 93, the Court said:

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State. We think not. The reasons which led this Court in *Union Refrig. Transit Co.* v. *Kentucky*, 199 U. S. 194, and *Frick* v. *Pennsylvania*, 268 U. S. 473, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive. And the fiction of *mobilia sequuntur personam* 'was intended for convenience, and not to be controlling where justice does not demand it.' "

Moreover, in the attempted taxation on both the Ohio and foreign land trust certificates, the appellant is denied the equal protection of the laws. Counsel for appellees (brief, p. 58) say that there are neither allegations in the petition nor evidence to lay the foundation of fact to show this. As to the petition, we call attention to the following language (R. 44-45):

> "Plaintiff says that General Code of Ohio, Section 5323, purports to except from taxation as investments 'interests in land and rent and royalties derived therefrom other than equitable interests divided into shares evidenced by transferable certificates,' that is, said section purports to except from taxation as investments interests in land, legal and equitable, rents derived therefrom when not evidenced by transferable certificates, but does not except from taxation as investments equitable interests in land and rents derived therefrom when evidenced by transferable certificates.

"Plaintiff says that the assessing and collecting of taxes on plaintiff's said equitable interests in land evidenced by transferable certificates, when all other equitable interests in land not so evidenced are exempted therefrom, is an arbitrary and unreasonable discrimination without warrant of law, and amounts to a taking of private property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the law, in violation of plaintiff's rights under the Constitution of the United States and of Article XIV, Section 1 of the amendments thereto."

As to the factual presentation, none was necessary, since the discrimination appears on the face of the statute itself. No equitable interests in land, however arising or of whatever nature, are taxed except those "divided into shares evidenced by transferable certificates" (G. C. Ohio § 5323, main brief, page 50). If the legal interests were divided into shares and a single transferable certificate issued for each legal interest (e. g., by taking smaller pieces of property as units) then there would be no tax. If the equitable interests were divided into shares, no matter how minute and no matter in what manner, so long as they were not "evidenced by transferable certificates," there would be no tax. The beneficial interests might be exactly the same and the rights of the equitable owners exactly the same, but the tax is imposed by Ohio where a certificate is issued and is not imposed where a certificate is not issued. This Court does not need evidence to show that that is arbitrary discrimination. It is perfectly evident that the Ohio Legislature has recognized either that it cannot or it should not tax equitable interests, because the land itself has already borne its full share of taxes, but has tried to single out, not one type of equitable interest but a part of that type which is evidenced in a particular way.

The cases cited in our main brief show that in some trusts certificates are issued and in some they are not. No attempt is made by appellees to answer the argument made in our main brief that the tax is virtually a tax on the *evidence* of certain kinds of equitable interests in real estate, since such interests where not evidenced by so-called "transferable certificates" are admittedly not subject to tax. Indeed, in one of the cases relied upon by opposing counsel, *Kirtland* v. *Hotchkiss*, 100 U. S. 491, quoted in their brief (p. 17), this Court distinguished between a property right and the evidence of such right. Our Ohio courts have likewise held that a state has no right to tax evidence of an interest in property apart from the property itself. (See our main brief, pages 36 and 37.)

In *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, this Court said at page 160:

> "With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced, shall be treated alike.'. *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman*, 277 U. S. 32, 37; *Air-Way Corporation* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240."

In *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, in holding invalid a recording tax which taxed only mortgages not maturing within five years, this Court said, at page 37:

". . . *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237."

The decision of this Court in *Stewart Dry Goods Co.* v. *Louis*, handed down March 11, 1935, is helpful of the problems in this case in more than one particular. The Court cites *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328, as follows:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In the instant case it should be noted that the tax is closer to a gross receipts tax than to a net income tax. The tax in the instant case purports to be and is a tax on property, merely using the "income yield" as a basis for measurement.

In the *Stewart Dry Goods Co.* case, *supra*, this Court said:

"The operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land, similarly graduated according to the number of parcels owned."

What is the difference between graduating a tax according to the parcels owned and taxing some real estate twice because a paper has been issued to evidence an equitable interest, while another piece of real estate on which exactly the same equitable interest has been raised is not taxed because the evidentiary piece of paper is not issued?

CONCLUSION

Irrespective of the nature of the property, it may not be taxed except at its *situs*. The *situs* of real property held in trust is where the property is located.

The interposition of a trustee between the owner of the land and the leasehold tenant does not create a new property right, but merely a division of the entire property. No one would question the unconstitutionality of an act attempting to tax the legal life interest of a beneficiary in real estate, if the real estate had already been taxed at its full value. It is equally unjust to tax the equitable owner, who has the complete beneficial interest, when the real estate has already paid the full tax. The trustee holds title solely for the equitable owner. When the trustee or the lessee with whom he has contracted has paid the tax on the real estate, the tax has been paid on the whole beneficial interest. This is the reality. There is no new economic entity created which should bear an additional tax burden.

The judgment of the Ohio Supreme Court should, therefore, be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 658.

MAX SENIOR,

Appellant,

vs.

GEORGE C. BRADEN, QUINCY A. DAVIS, CARLTON S. DARGUSCH, AND ANTHONY J. KRAUS, CONSTITUTING THE TAX COMMISSION OF OHIO; ROBERT HEUCK, AS AUDITOR OF HAMILTON COUNTY, OHIO; AND HARRY A. FREIBERG, AS TREASURER OF HAMILTON COUNTY, OHIO,

Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

On January 1, 1932, Max Senior, the appellant, a citizen and resident of the city of Cincinnati, Hamilton county, Ohio, was one of the beneficiaries under certain declarations of trust, and as such received at various

times during the calendar year 1931 cash distributions of income thereon, as set forth in his petition (R., 43), as follows:

Description	Interest	Income Yield
Lincoln Inn Court, Cincinnati Ohio,	340/1275ths	$1,445.04
Clark-Randolph Building Site, Chicago, Illinois	5/3250ths	262.50
Woman's City Club, Cincinnati, Ohio	5/1000ths	10.00
Rockefeller Building, Cleveland, Ohio	2/1400ths	120.00
Insurance Exchange Building, Boston, Massachusetts	1/1900ths	13.75
City National Bank Building, Omaha, Nebraska	5/1000ths	275.00
Fidelity Mortgage Company, Cleveland, Ohio	7/1050ths	105.00

At the time of the filing of the petition in this case, Section 5328-1 of the General Code of Ohio (114 Ohio Laws, 717, 718) provided that the investments of persons residing in the state of Ohio should be subject to taxation;[1] Section 5323 (id. 715) defined the term "investments" so as to include incorporeal rights of a pecu-

[1] "Sec. 5328-1. All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * *" (For Sec. 5328-1 in full see page 63, this brief.)

niary nature from which income is or may be derived, however evidenced, including equitable interests divided into shares evidenced by transferable certificates;[3] Section 5638 (id. 722) imposed a tax upon productive investments at the rate of five per centum of their income yield;[4] and Section 5389 (id 721, 722) defined the term "income yield" as the aggregate amount paid as income by the trustee to the beneficiary of an investment held in trust, whether including the taxpayer or not, during the taxable year.[5]

In filing his return for the year 1932 with the county auditor of Hamilton county, Ohio, the appellant disclosed but did not list for taxation therein his interest in the several trusts referred to in his petition (R., 43) according to its income yield as required by the statute; on the contrary, he refused to include that interest in his re-

[3] "Sec. 5323. * * * Annuities, royalties and other contractural obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in lands and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom." (For Sec. 5323 in full see page 61, this brief.)

[4] "Sec. 5638. For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to-wit: investments, five per centum of income yield; * * *" (For Sec. 5638 in full see page 70, this brief.)

[5] "Sec. 5389. * * * 'Income yield' as used in Section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following: * * * in the case of equitable interests, the cash distributions of income so made. * * *" (For Sec. 5389 in full see page 68, this brief.)

turn on the theory that the sections of the General Code of Ohio heretofore referred to were and are unconstitutional in that they offend the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States,* and Article I, Section 16, and Article XII, Sections 2 and 5 of the Constitution of the state of Ohio.* (R., 45, 46.) Further, in order to prevent the county auditor of Hamilton county, Ohio, from proceeding to make an assessment against him with respect to his interest in the several trusts, measured by the distribution of income made to and received by him in accordance with the terms of the declarations of trust creating them, appellant filed a petition in the Court of Common Pleas of Hamilton county, Ohio, (R., 42), praying that court to declare Section 5323 of the General Code of Ohio, in so far as it purported to subject that interest to taxation, unconstitutional and void and to restrain the appellees from "assessing or collecting or attempting to assess or collect from plaintiff (appellant) the Ohio intangible property tax on plaintiff's (appellant's) said equitable interests * * *."

" * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (For the Fourteenth Amendment in full, see page 72, this brief.)

*Article I, Section 16, of the Constitution of the state of Ohio, reads, in part, as follows: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Article XII, Section 2, reads in part as follows: "* * * Land and improvements thereon shall be taxed by uniform rule according to value. * * *"

Article XII, Section 5, reads as follows: "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

(R., 46.) The appellees thereupon admitted that unless otherwise restrained they would assess and proceed to collect the tax upon appellant's interest in the several trusts as the statute required them to do, and for further answer denied each and every allegation of the petition, at the same time praying that the petition of the appellant be dismissed. (R., 48.)

In this manner the petition and answer raised an issue involving the application of Sections 5323, 5328-1, 5638, and 5389 of the General Code of Ohio to the interest of the appellant in the several trusts, and the constitutionality of Section 5323 as so applied, under the provisions of the federal and state constitutions.

The Court of Common Pleas, Hamilton county, Ohio, held for the appellant. *Senior v. Braden, et al.*, 30 Ohio Nisi Prius (New Series) 147 (1933). Appellees thereupon moved for a new trial (R., 53), which motion was overruled (R., 53, 54); but upon a petition in error to the Court of Appeals, First Appellate District of Ohio (R., 12, 13), the judgment of the Court of Common Pleas was reversed and judgment was ordered to be entered for the appellees. *Braden et al., v. Senior*, 48 Ohio App., 255, (1934), (R., 157-166, where the opinion is reprinted in full). Appellant then applied for a rehearing (R., 14), which was denied (R., 34), and upon a petition in error claiming constitutional questions (R., 1), the Supreme Court of Ohio affirmed the judgment of the Court of Appeals of the First Appellate District of Ohio. *Senior v. Braden, et al.*, 128 Ohio St., 597, (1934), (R., 168-180, where the opinion is reprinted in full). The case is now before this court upon an appeal from the Supreme Court of Ohio (R., 180).

THE PROBLEMS OF THE CASE.

The problems presented in this case are:

(1) Is the question presented, a federal question for the Supreme Court of the United States to consider?

(2) Has the state of Ohio power to tax the interest of the appellant in the several trusts referred to in his petition (R., 43); and, if so,

(3) Has that power been exercised by the General Assembly of Ohio in conformity with the provisions of the federal and state constitutions?

THE ARGUMENT OF THE APPELLEES.

In general, the argument of the appellees will show:

I.

That the determination of appellant's interest is purely a state question, not involving any violation of the Constitution of the United States, and therefore not subject to review by the Supreme Court of the United States.

II.

(a) That the state of Ohio has the power to tax intangible *personal property*, including *equitable choses in action*, owned by its citizens and residents;

(b) That *the interest of the appellant* in the various trusts referred to in the record *is a species of intangible personal property* comprised in a bundle of equitable choses in action, and not as the appellant alleges an equitable interest in land; and, therefore,

(c) That the interest of the appellant in the various trusts is within the power of the state of Ohio to tax.

III.

That the tax laid by the state of Ohio upon the intangible personal property of the appellant has been imposed in conformity with the provisions of the federal and state Constitutions.

I.

THERE IS NO FEDERAL QUESTION PRESENTED FOR THE SUPREME COURT OF UNITED STATES TO CONSIDER.

Appellant's brief discloses that the ground upon which the appellant relies to sustain the appellate jurisdiction of the Supreme Court of the United States is that the state of Ohio by virtue of Section 5323 of the General Code of Ohio is attempting to assess and collect taxes upon land or an interest in land in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. The syllabus of the opinion of the Supreme Court of Ohio shows that that court held that the interest of the appellant in the several trust estates referred to in the record in this case is not land or an interest in land but consists of a bundle of equitable choses in action, viz: rights to participate in the net rental of the real estate being administered by the respective trusts, as to the taxation of which constitutional limitations upon the power to tax land or interests therein have no application.

Inasmuch as the determination of the nature of the interest of the appellant in the several trust estates is purely a question of local law, the decision of the Supreme Court of Ohio is not reviewable by the Supreme Court of the United States.

Moffitt v. Kelly, 218 U. S., 400, 403, (1910);
Iowa Central Railway v. Iowa, 160 U. S., 389, 393, (1896);
Castillo v. *McConnico*, 168 U. S., 674, 683, (1898);
Lombard v. West Chicago Park Commissioners, 181 U. S., 33, 43, 507, (1901);
French v. Taylor, 199 U. S., 274, 277, (1906);
Rawlins v. Georgia, 201 U. S., 638, 639-640, (1906);
Hart v. Smith, 203 U. S., 129, (1906);
Hannis Distilling Company v. Mayor and City Council of Baltimore, 216 U. S., 285, 294, (1910);
McDonald v. Oregon Railroad and Navigation Company, 233 U. S., 665, 669-670, (1914);
St. Louis and Kansas City Land Company v. Kansas City, 241 U. S., 419, 427, (1916);
Gasquet v. La Peyre, 242 U. S., 367, (1917);
Nickel, et al., v. Cole, 256 U. S., 222, 225, (1921).

A decision of a state court resting upon the construction and not upon the validity, of a statute of the state does not present a federal question.

Grand Gulf R. and B. Co. v. Marshall, 12 How., 165, (1851);
Ferry v. King County, 141 U. S., 668, (1891);
Snell v. Chicago, 152 U. S., 191, (1894).

The construction of a state statute by the highest court of the state must be accepted by the Supreme Court

of the United States when testing the validity of the statute under the Constitution of the Unied States.

Quong Ham Wah Co. v. Industrial Accident Commission of California, 255 U. S., 445, (1921).

The facts in the case of *Moffitt v. Kelly*, supra, were as follows: James Moffitt was married in California in the year 1863 and there resided with his wife until his death, in 1906. He left a large amount of property, all of which formed part of the community which existed between himself and his wife. Moffitt disposed of his estate to his wife and children, by will in the same proportions as if he had died intestate. It was held by the Probate Court that the interest of the widow in the community property of herself and her deceased husband was subject to be taxed under a law of California of 1905, which taxed all property passing by will and in case of intestacy from any person who died seized or possessed of the same. A tax was thereupon assessed against Mrs. Moffitt's one-half interest in the estate and an order was entered directing payment thereof by the executor. An appeal was taken to the Supreme Court of California.

The single question presented by the appeal, as stated in the opinion of the Supreme Court, was "whether the surviving wife's share of community property is subject to this inheritance tax?" The question was answered in the affirmative. In an opinion denying an application for rehearing, the court also adversely disposed of the

contention that the enforcement of the tax would violate the contract clause or the equal protection and due process clauses of the Constitution of the United States. 153 California, 359. The case was then brought to this court. This court, in affirming the decision of the Supreme Court of California, said:

> "It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the state of California has imposed an inheritance tax upon the share of the wife in the community, and thereby taxed her as an heir of her husband, when, if the laws existing at the time of the celebration of the marriage be properly construed, and be held to be contractual, she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred, and arose only on his death. But, for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because, in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the state had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment, arising upon the death of her husband, was subject to be taxed by the state, so far as the Constitution of the United

States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern. To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that, on an analysis of the Constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Mofflitts, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that, on the death of the husband, the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, because, as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the Constitution of the United States, and which therefore we have no right to review."

The case of *Nickel, et al., v. Cole*, supra, was a suit brought by the comptroller of Nevada to collect a transfer tax alleged to be due under a statute of Nevada, approved on March 26, 1913, to take effect thirty days from that date. The facts were these:

Miller, a resident of California, was the owner of a number of shares of stock of a Nevada corporation. On April 17, 1913, after the above-mentioned statute had been passed, but before it went into operation, Miller in California, made a will, and at the same time a deed of

trust, conveying his stock to Nickel, et al., in trust for himself for life, and after his death, upon limitations similar to those in the will,—any payment under the will to be in satisfaction of the provisions both in the will and in the deed. The deed contained no power of revocation, the stock was endorsed and delivered to the trustees, and thereafter was retained by them. Miller died on October 14, 1916. Under the provisions of said statute, a tax was imposed upon the transfer of all property which passed in trust or otherwise by will or by statutes of inheritance or by deed or gift made without valuable and adequate consideration, in contemplation of the death of the grantor or the donor, or to take effect in possession or enjoyment at or after such death.

It was contended by those who took upon Miller's death, that their interest vested when the deed was delivered and the statute did not apply. The Supreme Court of Nevada seems to have conceded that if their interest was vested when the deed was delivered, the statute perhaps could not apply. However, they reached the result by holding that the execution of the deed and will was one transaction, and gave no vested right until Miller's death. Thereupon, it was declared by those who took that the above limitation to the statute being admitted, the said court could not find the supposed constitutional difficulty by assuming a view of the instrument that is deemed to be plainly untenable and contrary to the law of California where the parties lived and the

transfer made. In affirming the judgment of the Supreme Court of Nevada, this court stated:

> "But the answer to this is that when, as here, there can be no pretense that the court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision, whether right or wrong.
>
> *Enterprise Irrig. Dis. v. Farmers Mut. Canal Co.*, 243 U. S., 157.

> And when, as here, the statute unquestionably might have made the tax applicable to the transfer, we do not inquire very curiously into the reasoning by which the statute is held to justify the tax. 'As there was state power to tax * * * the question whether or not the interest under the circumstances was correctly subjected to the tax was a purely state question.'"

The questions presented in the instant case fall directly within the principle of *Moffitt v. Kelly* and *Nickel, et al., v. Cole*, supra. In each of said cases, the court stated that "when there was state power to tax, the question whether or not the interest under the circumstances was correctly subjected to the tax, was purely a state question."

In the matter before us, the issues presented to the Supreme Court of Ohio, were:

1. What is the interest of the appellant?

2. Is appellant's interest subject to tax under the statutes of Ohio?

Having determined the appellant's interest in the va-

rious trust estates is not an interest in land, but merely an intangible right, the court then held that such interest is taxable, notwithstanding the fact that the particular real estate out of which such intangible right issues, is likewise taxed.

So regarded, it is not contended by appellant that the state of Ohio has no power to tax his interest. The appellant, however, proceeds upon the assumption that his interest which is being subjected to taxation, is an interest in real estate and not an intangible right. The premise upon which his argument with reference to discrimination is based, is that his interest is an interest in land. Authorities cited by him deal with taxation of land and tangible personal property and consequently are irrelevant.

It is therefore respectfully submitted that *the determination of the Supreme Court of Ohio that the interest of the appellant in the several trust estates is an intangible right within the purview of Section 5323 of the General Code of Ohio, was the determination of purely a state question and the nature of appellant's interest in the several trust estates is not reviewable by this court.*

II.

THE POWER TO TAX: JURISDICTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The power to tax is one of the attributes of sovereignty and jurisdiction to exercise the power is coterminous with the territorial boundaries of the sovereign which seeks to impose the tax.

(a) Jurisdiction to Tax Tangible Property.

In the case of land, the rule that the power to tax extends only to land situate within the borders of the taxing state has never been questioned. *State Tax on Foreign-held Bonds*, 15 Wallace (U. S.), 300, 319 (1872); *Union Refrigerator Transit Company v. Kentucky*, 199 U. S., 194, 204 (1905). The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction of the taxing state, and, consequently, the rule is that such property is subject to taxation in the state where it is permanently located, irrespective of the place of the domicile of its owner. *Union Refrigerator Transit Company v. Kentucky*, supra; *Old Dominion S. S. Company v. Virginia*, 198 U. S., 299, 305 (1905). Where, however, tangible personal property has not acquired a *situs* of its own, it is taxable at the *domicile* of its owner. *Southern Pacific Company v. Kentucky*, 222 U. S., 63 (1911).

(b) **Jurisdiction to Tax Intangible Personal Property.**

In the case of *intangible* personal property, however, considerations applicable to ownership of physical objects are obviously inapplicable, and taxation of such property at the place of domicile of the owner has been uniformly upheld. *State Tax on Foreign-held Bonds*, supra; *Kirtland v. Hotchkiss*, 100 U. S., 491 (1879); *Fidelity & Columbia Trust Company v. Louisville*, 245 U. S., 54, 58 (1917); *Blodgett v. Silberman*, 277 U. S., 1, 15 (1928); *Maguire v. Trefry*, 253 U. S., 12, 17 (1920); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 280 (1932); compare *Farmers Loan & Trust Company v. Minnesota*, 280 U. S., 204 (1930); *First National Bank of Boston v. Maine*, 284 U. S., 312 (1932).

In *Kirtland v. Hotchkiss*, supra, where the question whether or not the state of Connecticut had power to tax the property of one of its citizens represented by certain bonds evidencing a debt owing to him by a citizen of the state of Illinois was involved, this court, at page 498, said:

> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys.
>
> "That debt, although a species of intangible prop-

> erty, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt —the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds* (supra), the right of the creditor 'to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, • • • has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein,' etc. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the state."

The cases heretofore cited have dealt with the power of a state to tax debts, claims, rights, etc., i. e., choses in action of a *legal* nature. However, in cases where the subject of the tax is an *equitable* chose in action or claim, the same principles have been applied. Thus, in *Maguire v. Trefry*, supra, where the question was presented as to the power of the state of Massachusetts to tax a resident beneficiary of a foreign-held trust, this court, at page 16, said:

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and

interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others.' 2 Story's Equity, 11th Ed., § 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

"The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the State. *The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the State which are held taxable at the domicile of the owner. Kirtland v. Hotchkiss*, 100 U. S. 491." (Italics added.)

It is, therefore, respectfully submitted that under the decision of this Court *intangible personal property in the nature of choses in action, whether legal or equitable belonging to residents of the state of Ohio, is subject to the power of that state to tax, irrespective of the place of domicile or residence of the obligor or obligors, in so far as the due process clause of the Fourteenth Amendment to the Constitution of the United States is concerned.*

III.

THE POWER TO TAX: JURISDICTION UNDER ARTICLE XII, SECTION 2, OF THE CONSTITUTION OF OHIO.

In the state of Ohio, the power to tax is an attribute of sovereignty included in the general legislative power conferred by Article II, Section 1, of the Constitution of Ohio upon the General Assembly, and is plenary with respect to all property situate within the borders of the state, except that in the case of land, it must under Article XII, Section 2, of the Constitution of Ohio, be taxed by uniform rule according to value.[1] Accordingly, the power of the General Assembly of Ohio to select intangible personal property, including equitable choses in action, belonging to its citizens and residents as the subject of taxation is unlimited, and may be exercised as it sees fit, as long as the manner of its exercise discloses no arbitrary discrimination.

[1] See paragraph two, note 6.

IV

THE POWER TO TAX: CONCLUSIONS.

In the light of the foregoing discussion, it may be candidly admitted that under the Fourteenth Amendment to the Constitution of the United States, the state of Ohio has no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the state in any other manner than by uniform rule according to value, under Article XII, Section 2, of the Constitution of Ohio. From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land or an interest in land, situate within or without the state, their action is unconstitutional and should be permanently enjoined. *If, however, the property of the appellant in the several trusts is unequivocally shown by the record in this case to be in fact a species of intangible personal property in the nature of a bundle of equitable choses in action, then the state of Ohio has the power to impose the tax which the appellees, pursuant to provisions of the General Code of Ohio, have sought to do, without offending either the due process clause of the Fourteenth Amendment to the Constitution of the United States, or Article XII, Section 2, of the Constitution of the state of Ohio.*

With the law of the case dealing with jurisdiction to tax thus established, it is at once apparent that its *major*

problem is to determine the nature of the interest of the appellant in the several trusts, since constitutional limitations which restrict the power of the state of Ohio to tax land or interests therein have no application to the taxation of intangible personal property. The appellant holds and enjoys his interest under various agreements and declarations of trust which have been introduced in evidence and made a part of the record in this case (R., 65-140). These documents disclose that his interest in each trust now before this Court is by nature an equitable chose in action, as, it is submitted, the analysis now to be made will show.

V.

ANAYLSIS OF THE NATURE OF THE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS AS DISCLOSED BY THE AGREEMENTS AND DECLARATIONS OF TRUST INTRODUCED BY HIM IN EVIDENCE.

Although there are seven distinct trusts involved in this case, in general the agreements and declarations of trust in all of them follow parallel lines; and for this reason counsel for the respective parties have agreed (R., 183-184) that the decision of this Court with respect to the taxation of the appellant's interest in the trust evidenced by certificate marked Exhibit 2 (R., 67), shall be applied to the taxation of his other interests in those trusts in which real estate situated outside the state of

Ohio comprises the corpus thereof; and that the decision of this Court with respect to the taxation of his interest in the trust evidenced by certificate marked Exhibit 7 (R., 75) shall be applied to the taxation of his other interests in those trusts in which real estate situated within the state of Ohio comprises the corpus thereof, excluding his interest in the Lincoln Inn Court Trust, evidenced by certificate marked Exhibit 1 (R., 65), the declaration of trust of which (R., 82) will be considered separately in this brief.

(a) **Analysis of the Clark-Randolph Building Site Trust (Exhibit 10, R., 94).**

On March 15, 1928 (effective as of March 1, 1928), William G. Pohl and his wife Cecelia Pohl, conveyed to the Chicago Title and Trust Company, of Chicago, Illinois, certain premises known as the Clark-Randolph Building site, situate in Chicago, Illinois, subject to a lease by which Pohl had demised to one Leo M. Sage a term of ninety-nine years, renewable, at the option of the lessee, for one additional like term, in consideration of the lessee's promise, *inter alia*, to pay a stipulated rental. Simultaneously with the execution and delivery of the deed, the trust company and Pohl, acting for himself and such persons, partnerships, associations, and/or corporations as might thereafter become parties thereto by acceptance of certificates of equitable ownership, entered into an agreement and declaration of trust by which the trust company, as trustee, agreed to hold the title to the

Clark-Randolph Building site, acquired from Pohl, in trust for the use and benefit of Pohl and all future holders of certificates of equitable ownership, it being agreed that all such certificates should be issued to Pohl in consideration of the conveyance by him and his wife of the Clark-Randolph Building site to the trust company. Thereafter, appellant acquired a 5/3250ths equitable interest in the trust and it is this interest (held by appellant on January 1, 1932) which the appellees seek to tax as an investment under the provisions of Sections 5323, 5328-1, 5638, and 5389 of the General Code of Ohio.

The certificate held by the appellant which evidences his interest in the Clark-Randolph Building site trust does not fully disclose the nature of that interest. On the contrary, it expressly provides, in part, as follows:

> "All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust * * * to which Declaration reference is hereby made for a statement of the rights and title of the holders of this Certificate and of all other certificates issued under the Declaration, in said property, and of the terms and conditions of said trust." (R., 68.)

Accordingly, recourse must be had to the agreement and declaration of trust, where the following terms and conditions, decisive of the issue now under consideration by this Court, may be found:

(1) **Duties of the Trustee and Rights of the Beneficiaries During the Continuance of the Trust Agreement.**

(i) "*Article I.* The Trustee hereby agrees that it will hold as Trustee upon the trusts hereinafter set forth, for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder * * * the title acquired by the Trustee by a certain deed dated as of March 1, 1928, * * * to the following described premises situated in the City of Chicago, County of Cook, and State of Illinois, and bounded and described as follows, to wit: Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original Town of Chicago." (Reprinted in full, R., 95.)

(ii) "*Article III. The Trustee agrees that * * * it will distribute among the Beneficiaries* * * in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all *the net proceeds of rentals* which may be *received* by it under the terms of the Lease. * * *." (Italics added) (Reprinted in full, R., 98).

(2) **Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Act of the Parties.**

(i) "*Article IV.* Section 1. * * * *Upon the exercise by the Lessee of the option to purchase the Trust Estate, the Trustee,* upon receipt of the option price * * * *shall distribute the net proceeds among the Beneficiaries* holding outstanding certificates * * * in accordance with the respective interests held by them as evidenced by their several certificates, and upon their surrender thereof. Thereupon, all certificates so surrendered * * * shall

be cancelled by the Trustee, * * *." (Italics added) (Reprinted in full, R., 100).

(ii) "*Article IV.* Section 2. *Upon the sale by the Trustee of the entire property comprising the Trust Estate,* pursuant to and *because of a default by the Lessee* in any of the provisions of the lease, *the Trustee,* upon receipt of the sale price * * * *shall distribute the net proceeds of such sale* * * * *among the Beneficiaries* holding outstanding certificates * * * in accordance with the respective interests held by them as evidenced by their several certificates and upon their surrender thereof. Thereupon all certificates so surrendered * * * shall be canceled by the Trustee." (Italics added) (Reprinted in full, R., 100, 101).

(iii) "*Article IV.* Section 6. The shares of equitable ownership represented by Land Trust Certificates issued hereunder are subject to call purchase by the Trustee, at the request of the Lessee, * * * at the call purchase price * * * and upon the date so designated for the purchase of such shares *the holders of such shares shall be entitled,* in respect to each share so called for purchase, *to the call purchase price thereof* * * * and thereafter shall have no other or further interest in the Trust Estate in respect to each share so called for purchase, and on presentation and surrender of such Certificate in accordance with such notice at the principal office of the Trustee, the holders of such Certificate evidencing the shares so called for purchase shall be entitled to receive, in respect to each share so called for purchase, such call purchase price and no more. * * *." (Italics added) (Reprinted in full, R., 103, 104)

(3) **Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Lapse of Time.**

(i) "*Article IV*. Section 7. In case upon the expiration of the original term of ninety-nine years of the lease the Trustee as Lessor shall, pursuant to the provisions of Section 6 of Article Three of the Lease, become the owner of the cash and/or securities, including any of said Land Trust Certificates, then in the Depreciation Fund, *the Trustee shall distribute pro rata to the owner or owners of the certificates issued hereunder and then outstanding* * * * *all cash and/or securities*, including any of said Land Trust Certificates, then in the Depreciation Fund." (Italics added) (Reprinted in full, R., 105).

(ii) "*Article XIV*. * * * Unless sooner terminated this trust shall terminate upon the expiration of the Lease hereinbefore mentioned, or if said Lease shall be renewed, then upon the expiration of the term of said renewal. In any case of the termination of this trust otherwise than upon the exercise by the Lessee of its option to purchase the Trust Estate, distribution shall be made by the Trustee in kind by conveyance of the Trust Estate in undivided legal interests, or *at the election of the Trustee*, by sale and distribution of proceeds as in this Declaration provided. * * *." (Italics added) (Reprinted in full, R., 115, 116).

(4) **Powers of the Trustee of the Clark-Randolph Building Site.**

The nature of the appellant's interest in the Clark-Randolph Building Site trust is further disclosed by an examination of the provisions of the trust agreement and

declaration relating to the powers of the trusts over the trust estate:

(i) "*Article IX.* • • • The Trustee shall have the exclusive right to control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligations to the Beneficiaries other than such as are expressly assumed hereunder." (Reprinted in full, R., 109-112.)

(ii) "*Article XIV.* This Declaration may be amended from time to time or the trust terminated by written instrument executed and acknowledged by the Trustee and consented to in writing by the owner or owners of three-fourths (¾) of the outstanding shares issued hereunder, • • •; provided, however, that no such amendment shall increase the liabilities of the Lessee under the Lease without its consent and provided further that *no such amendment shall deprive or take from the Trustee the control and/or discretion conferred upon it under this Declaration, or confer upon the owner or owners of outstanding shares issued hereunder, or any of them, any control over or voice in the administration of this Trust.*" (Italics added) (Reprinted in full, R., 115).

(iii) "*Article IV.* Section 4. The Trustee is fully authorized to complete any sale referred to in Sections 1, 2 and/or 3, (Article IV), full power and authority being hereby vested in it in connection with such sale to execute all conveyances, releases, cancellations, assignments and/or other transfers of the property sold as may be necessary or proper to convey title thereto, without securing any consent from the Beneficiaries, and any conveyance by the Trustee shall operate to divest all interest of the Beneficiaries in the property so conveyed, the in-

terest of the Beneficiaries being transferred to the proceeds of sale as provided by the terms of this Declaration." (R., 102.)

(b) **Analysis of the East Sixth Street, Cleveland, Ohio, Trust. (Exhibit 19, R., 117.)**

Although the provisions of the East Sixth Street Trust are substantially the same as those of the Clark-Randolph Building Site Trust, since it has been agreed between counsel for the respective parties (R., 183-184) that the decision of this Court with respect the certificates of equitable ownership issued under that agreement and declaration of trust shall be applied to the other certificates of equitable ownership relating to Ohio real estate involved in this case, it is necessary to make a detailed analysis thereof. As in the case of the appellant's certificate in the Clark-Randolph Building Site Trust, the certificate held by him which evidences his interest in the East Sixth Street Trust does not fully disclose the nature of his interest. Instead, reference is made to the agreement and declaration of trust under which it was issued:

"* * * All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust * * * to which Declaration reference is hereby made for a statement of the rights of the holder of this Certificate and all other Certificates issued under the Declaration, in said property and of the terms and conditions of said trust." (R., 75-76.)

An examination of Exhibit 19 (R., 117) shows that the rights of the plaintiff under the East Sixth Street Agreement and Declaration of Trust are, as follows:

(1) **Duties of the Trustee and Rights of the Beneficiaries During the Continuance of the Trust Agreement.**

(i) "*Article I.* The Trustee hereby declares that it holds and will hold as Trustee for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder * * * the title to the premises acquired by the Trustee by deed from The Fidelity Mortgage Company * * *." (R., 117-118.)

(ii) "*Article III.* The Trustee agrees that * * * it will distribute among the beneficiaries in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all the net proceeds which may be received by it under the terms of the Lease up to a total of Twenty-seven and 50/100 Dollars ($27.50) per half-year * * *." (R., 122.)

(2) **Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Act of the Parties.**

(i) "*Article V.* Each one/one-thousand-and-fiftieth (1/1050th) fractional share represented by Certificates issued hereunder is subject to purchase by call, upon the request of the Lessee, as provided in Article IV hereof, on and after July 1, 1940, at One Thousand Twenty-five Dollars ($1025.00) per share * * *." (R., 125-126.)

"*Article IV.* * * * the holders of such Certificates shall be entitled, in respect to each one/one-

thousand-and-fiftieth (1/1050th) interest so called for purchase, only to the amount in the hands of the Trustee for such purchase of such Certificate, and shall have no other or further interest in the Trust Estate in respect to each one/one-thousand-and-fiftieth (1/1050th) interest so called for purchase * * * and * * * shall be entitled to receive * * * such call purchase price and no more." (R., 125.)

(ii) "*Article VII.* Upon the exercise by the Lessee of the option to purchase the leased premises (granted in Article VI), or upon sale by the Trustee of the entire property comprised in the Trust Estate, pursuant to and because of default of the Lessee in any of the provisions of the Lease as provided in Article X hereof, the Trustee upon receipt of the option price or the sale price, as the case may may be, * * * shall distribute the net proceeds among the Beneficiaries holding outstanding Certificates, in accordance with the respective interests held by them, as evidenced by their several Certificates and upon their surrender thereof. Notice of any such distribution shall be given * * *. If after notice has been given * * *, the holder or holders of any outstanding Certificates shall fail or neglect to present the same at the time and place in said notice specified, the Trustee shall place to the credit of each outstanding Certificate the distributive share to which its holder is entitled, and shall be subject to no further liability and under no further duty to the Beneficiary holding the same under the trusts created by this instrument, except to pay to said holder such distributive share upon demand and the surrender of said Certificate, nor shall it be required to pay interest upon any fund so credited." (R., 127-128.)

(3) Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Lapse of Time.

The East Sixth Street Trust agreement contains no provision for termination of the trust by lapse of time. The only reference to the duration of the trust is found in Article X, as follows:

> "Unless terminated by sale of the Trust Estate this trust shall continue during the existence of the Lease and any renewals thereof, or any lease or leases made by the Trustee, under the terms hereof." (R., 132.)

In the East Sixth Street agreement and declaration of trust there is no provision whatever for distribution of the trust estate in kind, even at election of the trustee. If the lessee for the time being is in default, Article X directs the trustee to proceed, as follows:

> "In the event that the Lessee shall make default in any of the provisions of the Lease so that it shall have become necessary, or, in the opinion of the Trustee advisable, for the Trustee, as Lessor, to terminate the same, the Trustee shall give not less than fourteen (14) days' notice thereof to the Beneficiaries * * * and shall request therein advice as to whether the property should be offered for sale, or whether another lease thereof should be made, if possible. If the holders of not less than a majority in interest of the outstanding Certificates shall * * * notify the trustee, in writing, of their agreement upon the course to be taken, the Trustee shall endeavor in its discretion to comply with their wishes. In the event of the failure or neglect of the holders of not less than a majority in interest of the outstanding certificates to express their wishes within

the period above provided, or, in the event the Trustee shall find, after making reasonable efforts, that it is impracticable to comply with such expressed wish of said Certificate Holders, it shall have full authority to take such action with respect to selling, leasing for ninety-nine (99) years renewable forever, or for lesser terms, managing, operating or otherwise disposing of said property as it may deem advisable and for the best interest of said Certificate holders." (R., 130-131.).

(4) Powers of the Trustee of the East Sixth Street Trust.

The nature of the appellant's interest in the East Sixth Street Trust estate is further disclosed by referring to the provisions of the agreement and declaration of trust granting power over the trust estate to the Trustee:

(i) "*Article XIV.* • • • The Trustee shall have the exclusive right to manage and control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligations to the beneficiaries other than such as are expressly assumed hereunder.

"The Trustee shall likewise have full and unrestricted power and authority to enter into, execute and deliver any agreements and instruments in writing modifying, amending or supplementing the Lease, if and when, in the sole and absolute discretion of the Trustee or Lessor, it shall appear wise, expedient or proper so to do." (R., 135.)

(ii) "*Article VI.* • • • In the event that the Lessee exercises said option to purchase, the Trustee is fully authorized to complete such sale, full

power and authority being hereby vested in it to execute all conveyances, assignments and/or other transfers of the property sold as may be necessary or proper to convey title thereto, without securing any consent from the Beneficiaries." (R., 127.)

(c) Conclusions with Respect to the Clark-Randolph Building Site and East Sixth Street Trusts.

The necessity of laying emphasis upon the terms of the agreements and declarations of trust introduced in evidence by the appellant lies in the fact that it is only by reference thereto that the *nature* of his property in the several trusts can be ascertained and its taxability under the laws of Ohio can be determined. The record shows that on January 1, 1932, tax listing day in Ohio, all of the trust agreements under which the appellant claims were in full force and effect; that during the year preceding that date the trustees had performed their ordinary duties, namely, the collection of rents under the several leases and their distribution to the beneficiaries; and that the appellant had enjoyed his right to receive such distributions of income from the trustees (R., 43). In other words, *on January 1, 1932, tax listing day in Ohio, the interest of the appellant in the several trusts consisted of his rights to participate pro rata in the distribution of the net proceeds of rentals received by the trustees under the terms of the several leases referred to in the trust instruments, that is, claims against the various trustees in the nature of equitable choses in action entitling appellant to receive sums of money represent-*

ing his pro rata share of distribution of income made at stated intervals in accordance therewith. It is respectfully submitted that this interpretation of the agreements and declarations of trust is required by Article VI of the Clark-Randolph Building Site Trust agreement and declaration of trust (R., 106) and Article XI of the East Sixth Street agreement and declaration of trust (R., 132), paragraph 1 of Article VI of the Clark-Randolph agreement and declaration of trust reading in part as follows:

> "No Beneficiary as such shall have any legal title to the trust property itself, or any part thereof, real or personal, held by the Trustee, his interest being an equitable estate only, and he shall have no right to call for any partition of the Trust Estate during the continuance of the trust, any and all such rights being waived by the Beneficiaries, by acceptance of the Land Trust Certificates. * * *" (R., 106.) (R., 132, is in almost identical language.)

The proposition that the state of Ohio has the power to tax intangible personal property, including equitable choses in action, belonging to its citizens and residents, whether the domicile of the obligor or obligors thereof be within or without the state has not been contradicted. The only question, therefore, which this Court is called upon to decide at this stage of the case is whether or not the interest of the appellant in the several trusts is by nature such as to bring it within that rule. The appellees respectfully submit that the interest of the appellant is a species of intangible personal property consisting of a bundle of equitable choses in action because the provi-

tions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts. At the time the trusts were created, the interests of all the beneficiaries consisted merely of a congeries of rights, etc., and such was the interest acquired by appellant when he became a party thereto. Having made the property personalty for such purposes the appellees justifiably urge that it should be so considered when the appellant is called upon to support the government of the state under whose protection he enjoys the benefits which the ownership of the property brings to him. See *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 280-281 (1932); *Dana v. Treasurer and Receiver General*, 227 Massachusetts, 562 (1917); *Priestley v. Treasurer and Receiver General*, 230 Massachusetts, 452 (1918); *In re Stephenson's Estate*, 171 Wisconsin, 452 (1920).

(d) **Analysis of the Lincoln Inn Court Trust.**

The Lincoln Inn Court Trust has been reserved for separate treatment because of superficial differences in the manner in which the declaration of trust in that case has been drawn up. Thus, instead of describing the evidence of the interest of the beneficiaries therein as land trust certificates, it has been called a certificate of interest in ground rent. An examination of the terms of the declaration of trust (R., 82), however, discloses that sub-

stantially there is no difference between the interest of the appellant in the Lincoln Court Trust and his interest in the other trust estates referred to in his petition (R., 43).

The relevant portions of the declaration of trust in the Lincoln Court Trust are, as follows:

"KNOW ALL MEN BY THESE PRESENTS, on the 5th day of February, 1917, The Conrad-Windisch Company did sell and convey to The Title Guarantee & Trust Company the following described real property, * * *

"Now Therefore, said The Title Guarantee & Trust Company of Cincinnati, Ohio, hereby acknowledges, certifies and declares that it holds and will continue to hold the title to said premises for the use and benefit of the holders of certificates of interest in the ground rent hereinafter referred to and upon the following trusts, to wit:

"(1) To lease said premises to Charles F. Dickson for ninety-nine years renewable forever at an annual rental of $5,518.75 per annum, payable quarterly * * * with the privilege of purchase after ten years * * * for the sum of $127,500 * * *

"(4) To collect and receipt for the rental due upon said perpetual lease * * * and after deducting * * * the * * * Trustee's compensation, to distribute the balance to the holders of such certificate in proportion to the interest of each.

"(5) Upon the demand of one or more holders of such certificates aggregating $10,000 par value, and the surrender of such certificates to convey to such holders jointly by special warranty deed the proportionate part of the fee simple title to said property to which their certificates may entitle them. * * *

"(8) This trust shall continue until the exercise of the privilege of purchase reserved in said lease at

> which time all certificates must be surrendered to the Trustee, or until the entire property shall have been conveyed pursuant to the provisions of article (5) of this agreement. • • • When the privilege of purchase reserved in said lease shall be exercised, the Trustee shall forthwith convey said premises to the lessee or his assigns, and the rights of the certificate holders in said premises shall thereupon cease and determine and be transferred to the proceeds of sale in the hands of the Trustee." (R., 82-83, 86-87, 88.)

These excerpts from the Lincoln Inn Court declaration of trust show that the interest of the appellant therein was substantially identical with his interest in the other trusts, namely, to receive the payment of a sum of money at stated intervals, and to receive his *pro rata* share of the proceeds of a sale of the property to the lessee upon the latter's exercise of his option to purchase; and that it is taxable in the same manner and to the same extent as is his interest in the other trusts involved in this case. While it is true that upon demand and surrender of his certificates of equitable ownership the appellant would have been entitled to a conveyance of a proportionate part of the fee simple title to the property held by the trustee, there is no evidence whatever in the record to show that either of these conditions precedent had been fulfilled prior to January 1, 1932, tax listing day in Ohio. There is, therefore, no need to advert to what his tax liability might have been had he exercised the powers he possessed to acquire an interest different from that which he actually had on that day. As Mr. Justice Mc-

Reynolds of this Court said in *Union Tank Line Company v. Wright*, 249 U. S., 275, 286 (1919), "Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

VI.

ANALYSIS OF THE ARGUMENT OF THE APPELLANT THAT THE INTEREST OF A HOLDER OF A LAND TRUST CERTIFICATE IS AN INTEREST IN REAL PROPERTY.

In their brief counsel for the appellant make the assertion that "the interest of a holder of a land trust certificate is an interest in real property" (brief, 14), and they cite a number of cases and other authorities to support it, without, however, making any analysis of the cases cited or any attempt to demonstrate their applicability to the facts of the case now before this Court.

In general the cases and authorities cited by appellant may be classified as follows:

(1) cases decided by the courts of Ohio, together with an opinion of the attorney general of the state, rendered in 1926;

(2) cases decided by the courts of other states;

(3) cases decided by the courts of the United States;

(4) texts, treatises, and law review articles dealing with the subjects of equity and trusts; and

(5) the restatement of the law of trusts of the American Law Institute.

(1) Many, if not all, of the cases decided by Ohio

courts cited by counsel for the appellant were called to the attention of the Supreme Court of Ohio when this case was before it, but that Court apparently did not regard them as establishing a rule of decision applicable to the facts of the case, since it did not refer to any of them in its opinion. But, assuming for purposes of argument that they were in point, the Supreme Court of Ohio was at liberty to disregard them in reaching its conclusion in this case if it saw fit to do so. The decisions of this Court show that the Supreme Court of Ohio might even render an erroneous decision on a question of state law, or might overrule principles or doctrines established by previous decisions on which the appellant relied, without giving rise to a claim under the Fourteenth Amendment or otherwise conferring upon this Court the power of review. *Central Land Company v. Laidley*, 159 U. S., 103, 112 (1895); *Patterson v. Colorado*, 205 U. S., 454, 461 (1907); *Willoughby v. Chicago*, 235 U. S., 45, 50 (1914); *O'Neil v. Northern Colorado Irrigation Company*, 242 U. S., 20, 26-7 (1916); *Dunbar v. City of New York*, 251 U. S., 516, 519 (1920); *Rooker v. Fidelity Trust Company*, 261 U. S., 114, 118 (1923); *Tidal Oil Company v. Flanagan*, 263 U. S., 444, 450 (1924); *American Railway Express Company v. Kentucky*, 273 U. S., 269, 273 (1927); *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S., 673, 680 (1930). Under the decisions of this Court, cited supra, the decision of the Supreme Court of Ohio in this case must be regarded as the current expression of its views as to the nature of the property of the appellant which the appellees seek to tax.

A fortiori, the opinion of the attorney general of Ohio, relied upon by the appellant in his brief (p. 15), may be disregarded. Further, it may be said, that at the time this opinion was given, the Constitution of Ohio required that all property be taxed by uniform rule according to value. Since then, however, Article XII, Section 2, of the Constitution of Ohio (Reprinted in full, this brief, p. 71) has been amended so as to permit the General Assembly to classify personal property for purposes of taxation, and the provisions of the General Code now under consideration were enacted pursuant to that amendment. Furthermore said changes in the tax laws of Ohio necessarily call for a re-examination of the question of the nature of the beneficiaries' interest in trust estates of the kind involved in this case.

(2) Council for the appellant also cite a number of cases decided by courts of states other than Ohio. Again, it may be said, that many if not all of these cases were relied upon by the appellant in the Supreme Court of Ohio. Assuming for the purposes of argument that they were in point, their authority was persuasive merely, and their usefulness as an aid in reaching a conclusion in this case was at an end when the Supreme Court of Ohio rejected them.

(3) Counsel for the appellant also rely upon the case of *Brown v. Fletcher*, 235 U. S., 589 (1915), for the purpose of showing that "an equitable interest is not a chose in action, but an interest in property." (Appellant's brief, p. 21.) The facts of that case were these:

A, by will, directed that a sum of money be held in trust and invested for his son, B, who was to receive the income until he attained the age of fifty-five, when the "principal should be paid to him and belong to him absolutely." Subsequently, B assigned his interest under the trust to C, who thereafter transferred that interest to secure a note representing a loan made to him by D. When the note fell due, it was not paid and D, thereupon, demanded that the trustee pay over to him that to which he was entitled by virtue of the trust instrument, B having attained the age of fifty-five. The trustee refused and D then brought a suit in the United States District Court for the Southern District of New York. That Court, however, dismissed the bill on the ground that, as the assignor B, a citizen of New York, could not have sued the trustee, a citizen of the same state, neither could the complainant, D, his assignee, sue therein, even though he was a resident of the state of Pennsylvania, because Section 24 of the Judicial Code forbade district courts from taking cognizance of any suit to recover upon choses in action in favor of any assignee unless such suit might have been prosecuted in such court to recover upon said chose in action if no assignment had been made.

Upon appeal to this Court, the decree was reversed on the ground that B had an interest in and to the property that was more than a chose in action.

Reciting the fact that at the time the suit was brought B had reached the age of fifty-five when, according to the terms of the will directing the creation of the trust,

"the principal should be paid to him and belong to him absolutely," this Court said at page 599:

> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. * * *"

A comparison of the position of the complainant in the case of *Brown v. Fletcher* with that of the appellant in this case shows that whereas in the former case the complainant was entitled to an absolute transfer of the corpus of the trust to him at the time the suit was brought, in the instant case not only was the appellant not entitled to such a transfer on January 1, 1932, but, as the evidence shows, he would never be entitled to such a transfer even upon the termination of the trusts. Obviously, the nature of the interest of the beneficiary in an admittedly dry trust cannot be used as the basis for characterizing the nature of the interest of a beneficiary in an active or living trust. In the latter case, the nature of the beneficiary's interest at a given time can be determined only by resort to the trust instrument under which such interest is held; and when this is done in this case, it will be found, as heretofore indicated, that the rights of the beneficiary consist merely of claims against the various trustees to the *pro rata* distribution of income, during

the continuance of the trusts, and to the *pro rata* distribution of the proceeds of a sale of the trust estates upon their termination. Counsel for the appellant admit that this is the case in their brief (p. 10), where they say:

> "The land trust certificate holder is entitled to his proportionate share of the net rent, when, as and if collected by the trustee (R., 98), and his proportionate share of the purchase price, in case privilege of purchase is exercised (R., 100), or his proportionate share of the property held in trust in case there is default and *the trustee decides to distribute*, instead of making a sale (R., 115, 116)." (Italics added.)

It is, therefore, respectfully submitted that the reliance of the appellant upon *Brown v. Fletcher* is misplaced, and that it is not a precedent for the determination of the issues in this case.

(4) The quotations from various texts, treatises, and law review articles set forth by counsel for the appellant in their brief are apparently chosen at random and without reference to the facts of the case now before this court. Such statements *in vacuo* are of little, if any, assistance to the court in reaching a conclusion in a particular case. It is not denied that there is a controversy among writers on the law of trusts as to the nature of a beneficiary's interest. The most exhaustive discussion of the subject is found in an article by Professor Austin W. Scott, called "The Nature of the Rights of the Cestui Que Trust," in 17 Columbia Law Review, 269, and in an article by former Dean (now Mr. Justice) Stone, under the same title and in the same volume of the Columbia

Law Review at page 467. After considering the views of Professor Scott, Dean Stone, at page 500, said:

> "To summarize the matter, it is believed that the view of the nature of the right of the *cestui que trust* most consistent with the decisions and which gives greatest promise of the development of the law upon a moral basis is that the right of the *cestui* is a right *in personam* against the trustee, specifically enforceable with reference to the trust *res*; that the *cestui* acquires rights *in personam* against the third persons, not because he is equitable owner of the trust *res*, but through equity's imposing upon third persons, obligations *in personam*, because of their unconscientious interference with the right which the *cestui* has against the trustee; that, therefore, equity imposes on all the world the duty of not consciously aiding in a breach of trust or preventing the *cestui* from having the benefit of the obligation of the trustee. The great advance which equity made over the common law system was in the emphasis which it placed on the duty or obligation of the defendant, whereas law placed its emphasis on the right of the plaintiff. With this difference in fundamental conceptions, it was inevitable that law should to some extent become rigid and technical, and that equity, on the other hand, should approximate more closely the standards of an enlightened morality. If, therefore, the law should adopt the view that the right of the *cestui que trust* rests on the basis of the property right of the plaintiff in the trust *res*, rather than upon the duty of the community at large not to interfere consciously with the right of the *cestui* to have the performance of the trustee's duty, it would not only depart from the historical attitude of equity, but it would commit itself to a doctrine which as Maitland said 'is positively mischievous'. * * *."

The views thus expressed apply to the nature of the rights of the *cestui que trust* without regard to the terms of any specific declaration of trust. They are especially pertinent to the issues of this case where, at the time the agreements and declarations of trust were entered into, the parties thereto expressly provided that the beneficiaries should have no rights with reference to the trust estates other than to share in the distribution of income during the continuance of the trusts, and in the proceeds realized from the sale of the corpus upon their termination. Moreover, it should be noted that no question of aggression upon or infringement of the interest of the *cestui que trust* by third parties is raised in this case; nor is the matter of descent involved herein. The issue is solely as to the nature of the interest of the beneficiary for purposes of taxation.

(5) The restatement of the law of trusts of the American Law Institute is the work of Professor Scott and his associate reporters. As his article in the Columbia Law Review, supra, indicates, he is committed to the *in rem* theory of the nature of the interest of the beneficiary. Other authorities upon the law of trusts do not take this view. Thus, Professor Richard Powell, of the School of Law, Columbia University, testifying as an expert in the case of *Archer-Shee v. Garland*, (1931), A. C., 212, 218, stated the American view of the nature of the beneficiary's interest under a trust, in these terms:

> "Every express trust valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustee in law, and in equity, subject only to the execution of the trust period. *The*

> *persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in Equity.*" (Italics added.)

This is said to be "more closely in consonance with the traditional view of a court of equity." *Keeton*, Law of Trusts, (1934), p. 289.

VII.

THE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS UNDER CONSIDERATION IN THIS CASE IS NOT AN INTEREST IN LAND.

When a man says that A owns land or an interest in land, precisely what does he mean? Suppose for example, that A is the fee simple owner of Blackacre. In a popular sense he owns "land" or "an interest in land;" but, when examined, his interest or property relating to the tangible object that is called land will be seen to consist of legal relations between himself and other persons. In the leading case of *Eaton v. B. C. & M. R. R. Co.*, 51 N. H., 504, 511 (1872), Mr. Justice Jeremiah Smith said:

> "In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land * * * in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.'"

Thus, without attempting to exhaust the subject, A in relation to Blackacre may enter on the land and use it within limits fixed by law on grounds of social and economic policy as he pleases; he can keep others from entering on and using the land; and he can alienate his interest to another. Moreover, apart from the exercise of the power of eminent domain, no person may prevent his going on the land, or his using it within the limits referred to; nor can such person deprive him of these incidents of ownership without his consent. In short, A, as an owner of land has the privilege of using it, the right that no one else shall use it, the power to dispose of it, and the immunity from having it taken away from him. *Hohfeld*, Fundamental Legal Conceptions (1923), *passim*, but especially at page 96.

In the light of the foregoing analysis, the contention of the plaintiff that his interest in the several trust estates is land or an interest in land may be examined. Taking the Clark-Randolph Building Site Trust as typical, it appears that on January 1, 1932, a lessee was in actual occupancy of the premises under a ninety-nine year term, renewable for a like period. The lessor-trustee held the reversion, but even this was subject to an option to purchase. Could the plaintiff have used the land or building as he pleased on that date, or could he have kept others from using it? Could he have done any act which in any way might have changed the legal relations between the lessor and the lessee, or between them or either of them and any other person or persons on that day?

The answer to these questions is, obviously, no. The plaintiff could not have done any of these things because under the facts of this case he had no one of the incidents which in the aggregate constitute the bare bones of ownership or land or an interest in land. As heretofore demonstrated, his rights were exclusively personal, i. e., rights against the various trustees that they should distribute the income of the trust estates *pro rata* to the beneficiaries, including the plaintiff, during the continuance of the trusts; and upon their termination that they should distribute the proceeds realized from the sale or other disposition of the corpus. In a realistic sense, the property of the plaintiff in the trust estates was merely a species of intangible personal property, a bundle of equitable choses in action, and not land or an interest in land. His contention, therefore, being based upon an assumption which upon analysis turns out to be erroneous, should be denied.

On the basis of the foregoing analysis, it is respectfully submitted that the action of the appellees in this case in seeking to tax the intangible personal property of the appellant is sanctioned by the case of *Maguire v. Trefry*, 253 U. S., 12 (1920). Although the tax in that case was nominally an income tax, the reason why the state of Massachusetts had jurisdiction to tax was because the property from which the income was derived belonged to a resident beneficiary, and the case was, therefore, governed by the principle laid down in *Kirtland v. Hotchkiss*, 100 U. S., 491 (1879). In the instant

case, the subject-matter of the tax is the claims or rights of the appellant against the trustees of the various trusts, and the parallel is exact for the appellant is domiciled in Ohio, has the protection of her laws, and here receives and holds the income distributed by the trustees.

Nothing said by this court in the case of *Safe Deposit & Trust Company v. Virginia*, 280 U. S., 83 (1929) militates against this conclusion. The question of the power of Virginia, the domicile of the beneficiaries of the trust there under consideration, to lay a tax on the fair value of any interest in the trust estate actually owned by them, was not presented for consideration (p. 92). But if the question had been presented, as it is in this case, it is respectfully submitted that its answer may be found in the remarks of Mr. Justice Stone, in his concurring opinion. He said (p. 96):

> "If the question were here I should not be prepared to go so far as to say that the equitable rights *in personam* of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S., 194, 205; *Bristol v. Washington County*, 177 U. S., 133; *Kirtland v. Hotchkiss*, 100 U. S., 491; *Savings Society v. Multnomah County*, 169 U. S., 421, 431. In neither case, if the threat of double taxation were controlling, which under the decisions it is not, *Fidelity & Columbia Tr. Co. v. Louisville*, 245 U. S., 54, 58; *Cream of Wheat Co. v. Grand Forks Co.*, 253 U. S., 325, 330; *Citizens Nat'l Bank v. Durr*, 257 U. S., 99, 109; cf. *Swiss Oil Corporation v. Shanks*, 273

U. S., 407, 413, would it seem that in any real sense is there double taxation, since the legal interests protected and taxed by the two taxing jurisdictions are different."

VIII.

THE INTANGIBLE TAX LAW OF OHIO IMPOSES A TAX UPON THE EQUITABLE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS UNDER CONSIDERATION HEREIN.

In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically included within their terms. In cases of doubt a taxing statute is construed most strongly against the government, and in favor of the citizen. *Gould v. Gould*, 245 U. S., 151, (1917). Notwithstanding this rule of interpretation, there is no doubt whatever in the case now before this Court that the provisions of the intangible tax law of Ohio do impose a tax on the equitable interest of the appellant in the several trusts involved herein. The sections of the General Code, as amended and enacted in the intangible tax law, imposing a tax upon the equitable interest of the appellant in these trusts and providing for their assessment, are here noted.

Section 5328-1 of the General Code provides generally

for the taxation of intangible personal property, as follows:

> "All moneys, credits, *investments*, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * *" (Italics added).

Section 5323 of the General Code defines the term "investments" for purposes of taxation, as follows:

> "The term 'investments' as used in this title, includes the following:
>
> "Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing * * *.
>
> "Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; * * *.
>
> "Annuities, royalties and *other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced,* * * *.*
>
> "*All equitable interests*, life or other limited estates and annuity interests *in any investment hereinbefore described*, or in any fund made up of any such investments, wherever located" (Italics added).

Section 5370 of the General Code designates the persons who are required to return property for purposes of taxation. This section provides:

> "Each person shall return all the taxable property of which he is the owner excepting that required by this section or by the regulations of the commission to be returned for him by a fiduciary; *but noth-*

ing herein shall be so construed as to authorize any person to omit from his return of taxable property investments owned or held for his benefit by a fiduciary, or other taxable property so owned or held by a non resident fiduciary. * * *

"All the taxable property, *excepting investments*, of a person for whose benefit property is held in trust shall be returned by the trustee; and if any beneficiary of such a trust be a minor, an idiot or an insane person, residing in this state, and for whom there is no other fiduciary in this state, the commission may require such a trustee to return also the investments of any such beneficiary." (Italics added).

Section 5388 of the General Code lays down certain rules for the listing and assessment of personal property, tangible and intangible. This section provides, among other things, as follows:

"In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof in money, on the day as of which such investments are required to be listed."

Section 5389 of the General Code defines the term "income yield" in connection with the taxation of intangible property:

"'Income yield' as used in section 5388 of the General Code and elsewhere in this title means the

aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

"* * * In the case of equitable interests, the cash distributions of income so made. * * *"

Section 5638 of the General Code, so far as it is material to the question here presented, provides as follows:

"For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; * * *."

A reading of these sections of the General Code makes it plainly evident that it was the intention of the General Assembly to impose a tax upon contractual obligations for periodical payment of money and contractual or other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, including equitable interests, as investments, and that the tax which the appellees herein seek to collect from the appellant has been imposed. It will also be noted that under the provisions of Section 5370 of the General Code investments held in trust are not returned for taxation by the trustee, but by the owner of the equitable or beneficial interest in such trust estates. This provision of

the law is radically different from the pre-existing law governing the return of equitable interests in trust estates under which the trustee was required to list such property. The purpose and policy underlying the provisions of Section 5370 of the General Code, requiring the beneficiary of the trust to make the return for taxation, is to reach for purposes of taxation the interests of Ohio beneficiaries in trust estates, the corpus of which is held outside of the state. Obviously, the state of Ohio does not have any jurisdiction over a non-resident trustee and cannot tax such trustee or the corpus of the trust in his hands. By imposing the tax on the equitable interest in the trust estates only without respect to whether the trustee of said estates is in or out of this state, and by measuring the value of such equitable interest of the resident beneficiary in the trust estate according to the income yield to such beneficiary, the General Assembly has undertaken to reach a large amount of wealth which has heretofore been escaping taxation in this state. And it may here be observed that if the appellant prevails in his contentions in this case, persons residing in this state may now, as under the former law, invest their wealth in trust estates created in other states and thereby escape taxation in this state while enjoying the benefits thereof under the protection which the government of the state of Ohio affords.

The other sections above noted do not require extended comment. Sections 5388 and 5389 of the General Code indicate, among other things, how investments shall be assessed for purposes of taxation; and Section 5638 of the General Code provides for the rate of taxation on this class of property.

IX.

SECTION 5323 OF THE GENERAL CODE DOES NOT ESTABLISH AN ARBITRARY CLASSIFICATION, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR ANY OTHER PROVISION OF THE STATE OR FEDERAL CONSTITUTIONS.

There is no constitutional requirement, either in the Constitution of the state of Ohio, or in the Constitution of the United States, that its system of taxation shall be uniform as applied to individuals and corporations regardless of the circumstances in which it operates. The equal protection clause of the federal Constitution does not require a state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to observe a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discrimination not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. *Ohio Oil Company v. Conway*, 281 U. S., 146, 159 (1930); *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S., 232, 237 (1890); *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 283, 293 (1898); *Southwestern Oil Company v. Texas*, 217 U. S., 114, 121 (1910); *Brown-For-*

man Company v. Kentucky, 217 U. S., 563, 573 (1910); *Sunday Lake Iron Company v. Wakefield*, 247 U. S., 350, 353 (1918); *Heisler v. Thomas Colliery Company*, 260 U. S., 245, 255 (1922); *Oliver Iron Mining Company v. Lord*, 262 U. S., 172, 179 (1923); *Stebbins v. Riley*, 268 U. S., 137, 142 (1925); *State Board of Tax Commissioners v. Jackson*, 283 U. S., 527, 537 (1931); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 284 285 (1932).

The appellant contends that Ohio cannot, consistently with the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, tax some interests in real estate on a different basis than it taxes others where there is no reason for the classification, (Brief, p. 34); and that it is unconstitutional discrimination to tax equitable interests in land divided into shares evidenced by transferable certificates and to exempt from taxation (a) the same equitable interests when not represented by such certificates; and (b) legal interests in land, whether divided into shares or not, and whether represented by transferable certificates or not. (Brief, p. 35).

The whole case of the appellees rests upon a single proposition, namely, that the interest of the appellant in the several trusts is a species of intangible personal property comprised in a bundle of equitable choses in action, within the definition of the term "investments," contained in Section 5323 of the General Code of Ohio, and, as such, taxable without regard to constitutional

limitations upon the power to tax land. If this court should hold upon the evidence presented in the record that the interest of the appellant in the several trusts is land, then the case is at an end and no consideration need be given to the circumstances in which Section 5323 of the General Code operates under the equal protection clause since the existence of the power to tax within the restrictions of the Fourteenth Amendment or Article XII, Section 2, of the Constitution of Ohio, necessarily precedes a consideration of the manner of its exercise. If, however, this court should hold, as it is respectfully submitted it should on the facts set forth in the record, that the interest of the appellant in the several trusts is a species of intangible personal property, then the appellant can succeed under the equal protection clause only by showing that as applied to that interest, Section 5323 of the General Code is palpably arbitrary, that is, that no state of facts can be conceived reasonably to sustain it.

While underlying questions of fact may condition the constitutionality of legislation imposing taxes upon one class of persons or property and not imposing the same or similar taxes upon others, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. *Close v. Glenwood Cemetery*, 107 U. S., 466, 475 (1882); *Powell v. Pennsylvania*, 127 U. S., 678, 685 (1888); *Lindsley v. Natural Carbonic Gas Company*, 220 U. S., 61, 79, 83 (1911); *Chicago Dock Company v. Fraley*, 228 U. S., 680, 687 (1913); *Rast v. Van Deman & Lewis Company*, 240

U. S., 342, 357 (1916); *Wampler v. Lecompte*, 282 U. S., 172 (1930); cf., *Minnesota Rate Cases*, 230 U. S., 352, 461 (1913); Henry Wolf Biklo, 'Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action,' 38 Harvard Law Review 6. Therefore, unless the unconstitutionality of the statute appear on its face, or from facts which this Court must judicially notice, or from evidence appearing in the record showing affirmatively that the provision imposing the tax has no foundation to sustain it, the legislative act must prevail. *O'Gorman & Young v. Hartford Insurance Company*, 282 U. S., 251, 257 258 (1931); *Railway Express Agency v. Virginia*, 282 U. S., 440, 444 (1931); *Hardware Dealers Mutual Fire Insurance Company v. Glidden Co.*, 284 U. S., 151, 158 (1931); *Boston & Maine Railroad Company v. Armburg*, 285 U. S., 234, 240 (1932); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 283 (1932).

The most searching examination of the record in this case will fail to reveal any factual data whatever tending to show that appellant has been taxed upon his investments in a manner which is discriminatory when compared with other persons similarly situated for there are neither allegations in his petition nor presentation of evidence in his proof to lay the foundation of fact upon which the contention that the provisions of Section 5323 of the General Code of Ohio deny to him the equal protection of the laws must rest. For aught that appears that section of the General Code, as applied to investments generally including those of the appellant has

achieved not only practical but theoretical uniformity and equality. It is, therefore, respectfully submitted that the contention of the appellant that Section 5323 of the General Code of Ohio deprives him of the equal protection of the laws should be denied.

X.

CONCLUSION.

It is a general rule of construction that when a statute is attacked on the ground that it is unconstitutional every presumption is indulged in in favor of its validity. Out of respect for a co-ordinate branch of the government courts will not declare a statute unconstitutional except in the clearest case, that is, in a case where no reasonable ground whatever can be found upon which the action of the Legislature in enacting the statute can be sustained.

The authorities cited herein clearly sustain the power of the state of Ohio to tax the intangible personal property of the appellant here in question. That property has been subjected to taxation by the provisions of Sections 5323, 5328-1, 5370, 5388, 5389, and 5638 of the General Code. Moreover, it appears that the tax imposed and the statutory provisions imposing it do not offend the equal protection of the laws clause of the Fourteenth Amendment to the Constitutions of the United States nor the somewhat similar clause contained in the bill of rights of the Constitution of Ohio.

It is, therefore, respectfully submitted, that the judgment of the Supreme Court of Ohio should be affirmed by this Court.

Respectfully submitted,

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APPENDIX.

Text of Statutes and Constitutional Provisions.

Statutes.

The statutes involved in this case are as follows:

Section 5323.

The term "investments" as used in this title, includes the following:

Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the Congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by Chapter Four of this title, and (3) such as are defined in this chapter as "deposits."

Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this state yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by

whomsoever issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the federal government, or (3) prior to the first day of January, 1913, by the state of Ohio or any political or other subdivision or school district in this state and (4) bonds of the state of Ohio issued pursuant to Article VIII, Section 2a of the Constitution of Ohio and (5) such as are defined in this chapter as "deposits" and "current accounts."

Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorpeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located.

When any corporation provides and carries out a plan for the allotment and sale of any or all of its unissued shares, or of shares purchased or to be purchased, to the employees of the corporation or to the employees of subsidiary corporations or to a trustee on their behalf, and for the payment of such shares in installments or at one

time, and for the establishment of a special fund or funds in which such employees during the period of their employment or other period of time may be privileged to share on such terms and conditions as may be imposed in respect thereof; the relationship between the corporation or the trustee, if any, and each employee shall, for the purpose of determining the tax upon the shares concerned or upon any interest in them, be deemed to be a trust, and any tax upon the said shares or any interest in them shall be levied and assessed accordingly. (114 O. L., 715, 716.)

Section 5328-1.

All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state, and capital and surplus of domestic insurance companies, shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons,

and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock. (114 O. L., 717, 718)

Section 5370.

Each person shall return all the taxable property of which he is the owner excepting that required by this section or by the regulations of the commission to be returned for him by a fiduciary; but nothing herein shall be so construed as to authorize any person to omit from his return of taxable property investments owned or held for his benefit by a fiduciary, or other taxable property so owned or held by a non-resident fiduciary. The return of all the taxable property of a corporation shall be made by the president, a vice president, or the secretary and by the principal accounting officer thereof; that of a partnership, by a partner; and that of an association, by the managing agent thereof in this state.

In the following cases all taxable property belonging to the persons named or indicated shall be returned by the fiduciaries named:

That of a ward by his guardian; that of a minor, an idiot, or an insane person having no guardian, by his father, if living, if not, by his mother, if living, and if

neither father nor mother is living, by the person having such property in charge; that of an estate of a deceased person, by his executor, administrator or personal representative; and that of persons whose assets are in the hands of receivers, assignees for the benefit of creditors, trustees in bankruptcy or official custodians, by such receivers, assignees, trustees in bankruptcy or official custodians.

Personal property used in business and taxable property of a non-resident, used in and arising out of a business transacted for him or on his behalf in any of the cases mentioned in section 5328-2 of the General Code, in the possession or custody of any agent, factor, bailee or other similar fiduciary, shall be returned by such fiduciary, except that as to such property in the possession, custody or legal ownership of a trustee the provisions of the next succeeding paragraph of this section shall be exclusive.

All the taxable property, excepting investments, of a person for whose benefit property is held in trust shall be returned by the trustee; and if any beneficiary of such a trust be a minor, an idiot or an insane person, residing in this state, and for whom there is no other fiduciary in this state, the commission may require such a trustee to return also the investments of any such beneficiary.

All returns made as fiduciaries' returns shall be separate from the fiduciary's return as an individual, firm, association or corporation and shall set forth the names of all persons toward whom the relation of fiduciary is

borne or on whose behalf the returns are made, together with the capacity in which the fiduciary so acts for each of such persons.

The commission shall have power to adopt and promulgate regulations covering the making of returns not inconsistent with this section or any other provisions of this chapter, to the end that all property taxable in this state shall be returned for taxation. (114 O. L., 734)

Section 5388.

Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money,

on the day as of which such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at the true value thereof, in money, on the day as of which the same are required to be listed.

Personal property of the following kinds, used in business, shall be listed and assessed at fifty per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be:

(1) All engines, machinery, tools and implements of a manufacturer mentioned in section 5386 of the General Code, and all engines and machinery of every description used, or designed to be used in mining, and all tools and implements of every kind used, or designed to be used for such purpose, excepting or provided in the last paragraph of this section, and all engines, machinery, tools, implements and domestic animals used in agriculture.

(2) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining; the average value of all articles which were at any time by him manufactured or changed in any way, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith; and agricultural products on farms.

Boilers, machinery, equipment and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing the same shall be listed and assessed at the true value thereof in money, on the day as of which they are required to be listed, anything in this section to the contrary notwithstanding. (114 O. L., 720.)

Section 5389.

As used in section 5388 of the General Code and elsewhere in this chapter, the "true value in money" of any property means the usual selling price thereof at the time or times and place as of which it is required to be listed; but if there is no usual selling price known to the person whose duty it is to fix a value thereon, then, such price as is believed could be obtained therefor in money, at such time or times and place. In the case of personal property used in business, the book value thereof, if any, less book depreciation, at such time or times, shall be listed and such depreciated book value shall be taken to be the true value of such property, unless the assessor shall find that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from depreciated book value must be made in writing by the taxpayer at the time of making return; and when such return is made to the county auditor and required by this chapter to be transmitted to the commission for assessment, the county auditor shall, as deputy of the commission, investigate such claim and shall enter thereon, or attach thereto, in such

form as the commission may prescribe, his findings and recommendations with respect thereto; when such return is made to the commission such claim for deduction shall be referred to the auditor of each county wherein the property affected thereby is listed, as such deputy, for investigation and report.

"Income yield" as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

In the case of an obligation bearing interest, the amount of interest separately charged and paid during such year, if any, exclusive of payments on the principal; in the case of shares of stock, the cash dividends so paid; in the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per centum of half of the principal used to purchase the same, or, if there be no such principal, four per centum of half of the present worth of such payments if commuted, which shall be calculated, as of the date on which such investment is required by this chapter to be first listed, with interest at four per centum per annum and, in the case of annuities for life or lives, according to the Combined Annuity Four Per Cent. Table; in the case of equitable interests, the cash distributions of income so

made. At the request of the commission or of any county auditor, the superintendent of insurance shall, upon being furnished with a statement of the facts, compute upon a basis equivalent to that herein prescribed, the income yield of any investment as to which the interest is not changed and paid separately from the principal thereof, and the assessor shall be governed by the computation so made. (114 O. L., 721, 722.)

Section 5638.

For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar. (114 O. L., 722.)

Constitutional Provisions.

Article I, Section 16, Constitution of Ohio:

All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article XII, Section 2, Constitution of Ohio (in effect at time in question):

No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the first day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and, without limiting the general power, subject to the provisions of

Article I of this constitution, to determine the subjects and methods of taxation or exemptions, therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law. (113 O. L., 790.)

Article XII, Section 5, Constitution of Ohio:

No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.

Amendment XIV, Section 1, Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

25

SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1934.

Max Senior, Appellant,
vs.
George C. Braden, Quincy A. Davis, Carleton S. Dargusch, et al., &c.

Appeal from the Supreme Court of the State of Ohio.

[May 20, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

January 1, 1932—tax listing day—Sec. 5328-1, the Ohio General Code[1] provided that all investments and other intangible property of persons residing within the State should be subject to taxation. Section 5323 so defined "investment" as to include incorporeal rights of a pecuniary nature from which income is or may be derived, including equitable interests in land and rents and royalties divided into shares evidenced by transferable certificates. Section 5638 imposed upon productive investments a tax amounting to five percentum of their income yield; and Section 5389 defined "income yield" so as to include the aggregate income paid by the trustee to the holder, &c. Pertinent portions of Sections 5388 and 5389 are in the margin.[2]

[1]By Act of June 29, 1931 (114 Laws p. 714) providing for levy of taxes on intangible property etc., the Ohio General Assembly amended sections 5323, 5324, 5325, 5326, 5327, 5328, 5360, 5382, 5385, 5386, 5388, 5389 of the General Code and added supplemental sections 5325-1, 5328-1, and 5328-2.

[2]Sec. 5388. Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed. . . .

Section 5389. As used in Section 5388 of the General Code and elsewhere in this chapter, the "true value in money" of any property means the usual

Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some within Ohio, some without. On account of these beneficial interests he received $2,231.29 during 1931. The lands are adequately described in the margin.[1]

The tax officers of Hamilton County, where appellant resided, threatened to assess these beneficial interests, and then to collect a tax of five percentum of the income therefrom. To prevent this, he instituted suit in the Common Pleas Court. The petition asked that Section 5323, General Code, be declared unconstitutional and that appellees be restrained from taking the threatened action. The trial court granted relief as prayed; the Court of Appeals reversed and its action was approved by the Supreme Court.

With commendable frankness counsel admit that under the Fourteenth Amendment the State has "no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the State in any other manner than by uniform rule according to value". Consequently, they say, "if the property of appellant, which the appellees seek to tax in this case, is land or interest in land situate within or without the State, their action is unconstitutional and should be permanently enjoined".

The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature. *Moffitt* v. *Kelly*, 218 U. S. 400, 404, 405; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280. If the thing here sought to be subjected to taxation is really

selling price thereof at the time or times and place as of which it is required to be listed.

"Income yield" as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following: . . . in the case of equitable interests, the cash distributions of income so made."

[1] Lincoln Inn Court, Cincinnati, Ohio; Clark-Randolph Building Site, Chicago, Illinois; Woman's City Club, Cincinnati, Ohio; Rockefeller Building, Cleveland, Ohio; Insurance Exchange Building, Boston, Massachusetts; City National Bank Building, Omaha, Nebraska; and Fidelity Mortgage Company, Cleveland, Ohio.

an interest in land, then by concession the proposed tax is not permissible. The suggestion that the record discloses no federal question is without merit.

Three of the parcels of land lie outside Ohio; four within; they were severally conveyed to trustees. The declaration of trust relative to the Clark-Randolph Building Site, Chicago, is typical of those in respect of land beyond Ohio; the one covering East Sixth Street property, Cleveland, is typical of those where the land lies in Ohio, except Lincoln Inn Court, Cincinnati. Each parcel has been assessed for customary taxes in the name of legal owner or lessee according to local law, without deduction or diminution because of any interest claimed by appellee and others similarly situated.

The trust certificates severally declare—That Max Senior has purchased and paid for and is the owner of an undivided 340/1275ths interest in the Lincoln Inn Court property; that he is registered on the books of the Trustee as the owner of 5/3250ths of the equitable ownership and beneficial interest in the Clark Randolph Building site, Chicago; that he is the owner of 6/1050ths of the equitable ownership and beneficial interest in the East Sixth Street property, Cleveland. In each declaration the Trustee undertakes to hold and manage the property for the use and benefit of all certificate owners; to collect and distribute among them the rents; and in case of sale to make pro-rata distribution of the proceeds. While certificates and declarations vary in some details, they represent beneficial interests which, for present purposes, are not substantially unlike. Each trustee holds only one piece of land and is free from control by the beneficiaries. They are not joined with it in management. See *Hecht* v. *Malley*, 265 U. S. 144, 147.

The State maintains, that appellant's interest is "a species of intangible personal property consisting of a bundle of equitable choses in action because the provisions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts. At the time the trusts were created, the interests of all the beneficiaries consisted merely of a congeries of rights etc., and such was the interest acquired by appellant when he became a party thereto. . . . The rights of the beneficiary consist merely of claims

against the various trustees to the pro rata distribution of income, during the continuance of the trusts, and to the pro rata distribution of the proceeds of a sale of the trust estates upon their termination".

Appellant submits that ownership of the trust certificate is evidence of his interest in the land, legal title to which the trustee holds. This view was definitely accepted by the Attorney General of Ohio in written opinions Nos. 3040 and 3869 (Opinions 1926, pp. 375, 428) wherein he cites pertinent declarations by the courts of Ohio and of other states. See also 2 Cincinnati Law Rev. 255.

The theory entertained by the Supreme Court concerning the nature of appellant's interests is not entirely clear. The following excerpts are from the headnotes of its opinion which in Ohio constitute the law of the case:—

> "Land trust certificates in the following trusts [the seven described above] are mere evidences of existing rights to participate in the net rentals of the real estate being administered by the respective trusts".
>
> "Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Sec. 5323, General Code (108 Ohio Laws 715) does not provide for a tax against the equitable interest in land but does provide a tax against the income derived from such equitable interests".

Apparently no opinion of any court definitely accepts the theory now advanced by appellees, but some writers do give it approval because of supposed consonance with general legal principles. The conflicting views are elaborated in articles by Professor Scott and Dean Stone in 17 Columbia Law Review (1917) at pp. 269 and 467.

Maguire v. *Trefry*, 253 U. S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes from the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, and *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Those cases were disapproved by *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204. They are not in

harmony with *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, and views now accepted here in respect of double taxation. See *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *S. Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312.

In *Brown* v. *Fletcher*, 235 U. S. 589, 599, we had occasion to consider the claim that a beneficial interest in a trust estate amounts to a chose in action and is not an interest in the res, subject of the trust. Through Mr. Justice Lamar we there said:

> "If the trust estate consisted of land it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of Sec. 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell* case [*Bushnell* v. *Kennedy*, 9 Wall. 387, 393] nothing in Sec. 24 to prevent the holder by virtue of a bill of sale from suing for the 'recovery of the specific thing or damages for its wrongful caption or detention'. And if the funds had been converted into cash, it was still so far property—in fact, instead of in action—that the owner, so long as the money retained its earmarks could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the Trustee, not in opposition to the *cestui que* trust so as to give him a chose in action, but in possession for his benefit in accordance with the terms of the testator's will. . . .
>
> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. *Ham* v. *Van Orden*, 84 N. Y. 257, 270; *Stringer* v. *Young, Trustee*, 191 N. Y. 157; *Lawrence* v. *Bayard*, 7 Paige 70; *Woodward* v. *Woodward*, 16 N. J. (Eq.) 83, 84. The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in

action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property".

The doctrine of *Brown* v. *Fletcher* is adequately supported by courts and writers. *Narragansett Mutual Fire Ins. Co.* v. *Burnham*, 51 R. I. 371; *Bates* v. *Decree of Court*, 131 Me. 176; Bogert, Handbook of the Law of Trusts, 430; 3 Pomeroy Equity Jurisprudence, Fourth Edition, 1928, Sec. 975, p. 2117; 17 Columbia Law Review, 269, 289. We find no reason for departing from it.

The challenged judgment must be reversed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1934.

Max. Senior, Appellant,
vs.
George C. Braden, Quincy A. Davis, Carleton S. Dargusch, et al., etc.

Appeal from the Supreme Court of the State of Ohio.

[May 20, 1935.]

Mr. Justice Stone.

I think the judgment should be affirmed.

Tax laws are neither contracts nor penal laws. The obligation to pay taxes arises from the unilateral action of government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute the burden among those who must bear it. See *State of Alabama* v. *United States*, 282 U. S. 502, 507. To that obligation are subject all rights of persons and property which enjoy the protection of the sovereign and are within the reach of its power.

For centuries no principle of law has won more ready or universal acceptance. Even now that it is doubted, the doubt is rested on no more substantial foundation than want of "jurisdiction" to tax, and the assertion that the Fourteenth Amendment is endowed with a newly discovered efficacy to forbid "double taxation" when the sovereignty imposing the tax is that of two or more states. See *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 210; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, 92; *Baldwin* v. *Missouri*, 281 U. S. 586, 593; compare *Burnet* v. *Brooks*, 288 U. S. 378, 400 *et seq.* But as no opinion of this Court has undertaken to define the taxation which is thus forbidden because it is double, or to declare that different legal rights founded upon the same economic interest may never, under any circumstances, be compelled to contribute to the cost of government of two states whose protection they respectively enjoy, it would seem still to be open to inquiry whether the particular tax now imposed infringes any constitutional principle capable of statement and definition.

When we speak of the jurisdiction to tax land or a chattel as being exclusively in the state where it is located, we mean no more

than that, in the ordinary case of ownership of tangible property, the legal interests of ownership enjoy the benefit and protection of the laws of that state alone, and that it alone can effectively reach the interests protected for the purpose of subjecting them to the payment of the tax. Other states are said to be without jurisdiction, and so without constitutional power to tax, if they afford no protection to the ownership of the property and cannot lay hold of any interest in the property in order to compel payment of the tax. See *Union Transit Co.* v. *Kentucky*, 199 U. S. 195, 202; *Frick* v. *Pennsylvania*, 268 U. S. 473, 497.

But when new and different legal interests, however named, are created with respect to land or a chattel, of such a character that they do enjoy the benefits of the laws of another state and are brought within the reach of its taxing power, I know of no articulate principle of law or of the Fourteenth Amendment which would deny to the state the right to tax them. No one would doubt the constitutional power of a state to tax its residents on their shares of stock in a foreign corporation whose only property is real estate or chattels located elsewhere, *Darnell* v. *Indiana*, 226 U. S. 390; *Hawley* v. *City of Malden*, 232 U. S. 1; compare *Corry* v. *Baltimore*, 196 U. S. 466; *Kidd* v. *Alabama*, 188 U. S. 730; *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325, 329, or to tax a valuable contract for the purchase of land or chattels located in another state, see *Citizens National Bank* v. *Durr*, 257 U. S. 99, 108; compare *Gish* v. *Shaver*, 140 Ky. 647, 650; *Golden* v. *Munsiger*, 91 Kan. 820, 823; *City of Marquette* v. *Iron & Land Co.*, 132 Mich. 130, or to tax a mortgage of real estate located without the state even though the land affords the only source of payment, see *Kirtland* v. *Hotchkiss*, 100 U. S. 491; compare *Savings Society* v. *Multnomah County*, 169 U. S. 421; *Bristol* v. *Washington County*, 177 U. S. 133. Each of these legal interests, it is true, finds its only economic source in the value of the land, and the rights which are elsewhere subjected to the tax can be brought to their ultimate economic fruition only through some means of control of the land itself. But the means of control may be subjected to taxation in the state of its owner, whether it be a share of stock or a contract or a mortgage. There is no want of jurisdiction to tax these interests where they are owned, in the sense that the state lacks power to appropriate them to the payment of the tax. No court has condemned such action as capricious, arbitrary or oppressive. The

Fourteenth Amendment does not forbid it, for it is universally recognized that these interests of themselves are in some measure clothed with the legal incidents of property in the taxing state and enjoy there the benefit and protection of its laws.

Similarly, I do not doubt that a state may tax the income of its citizen derived from land in another state. The right to impose the tax is founded upon the power to exact it, coupled with the protection which the state affords to the taxpayer in the receipt and enjoyment of his income. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 279. I can perceive no more constitutional objection to imposing such a tax than to the taxation of a citizen on income derived from a business carried on by the taxpayer in another state, and subject to taxation there, which we upheld in *Lawrence* v. *State Tax Commission, supra;* see *Cook* v. *Tait*, 265 U. S. 47, or to the tax on income derived from securities having a tax *situs* in another state, upheld in *Maguire* v. *Trefry*, 253 U. S. 12; see also *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; compare *DeGanay* v. *Lederer*, 250 U. S. 376. The fact that it is now thought by the Court to be necessary to discredit or overrule *Maguire* v. *Trefry, supra*, in order to overturn the tax imposed here, should lead us to doubt the result, rather than the authority which plainly challenges it, and should give us pause before reading into the Fourteenth Amendment so serious and novel a restriction on the vital elements of the taxing power.

The present tax, measured by income, is upon intangible property interests owned by a citizen of Ohio. They are represented by transferable certificates, issued by trustees of land, under contracts by which each trustee undertakes to hold the title of specified lands in trust for the benefit of the certificate holders; to receive the income and to pay it over to them ratably, after meeting expenses and depreciation; and to receive and distribute ratably the proceeds of sale of the land if sold under existing options. In the event of default by the lessee, the trustee is given plenary authority to terminate the lease, take possession of the land and sell it, as fully as though it were the sole legal and equitable owner. The trustee is authorized to settle claims upon contract and tort made against the trustee or the trust estate, and is entitled to indemnity from the estate for all personal liability and expenses. It is authorized to borrow money and to give the trust estate as security.

The beneficiaries have no right to possession or to partition of the property, and can maintain no action at law with respect to it. They cannot be assessed, and incur no liability by virtue of the administration of the trust estate. The trust certificates are freely transferable, as are shares of stock in a corporation. The rights of the beneficiaries are so identified with the certificates that they may be transferred only on surrender of the certificate to the trustee. Certificates lost, stolen, or destroyed may be replaced by the trustee at its option and in its discretion. Compare *Kelliger* v. *Kentucky*, 213 U. S. 200, 206.

There is thus created an active trust of land, under which the trustee is clothed with all the incidents of legal ownership, and which is given the status of a business entity separate and distinct, for all practical purposes, from the interests of the certificate holders. See *Crocker* v. *Malley*, 249 U. S. 223; *Hecht* v. *Malley*, 265 U. S. 144, 161; *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110. The beneficiaries have none of the incidents of legal ownership. They can neither take nor defend possession of the land. But they are clothed with rights *in personam*, in form both contractual and equitable, enforcible against the trustee by suit in equity for an accounting, to compel performance of the trust or to restrain breaches of it. Such actions are transitory and maintainable wherever the trustee may be found. *Massie* v. *Watts*, 6 Cranch 148, 158-160; *Beattie* v. *Johnstone*, 8 Hare 169, 177; *Gardner* v. *Ogden*, 22 N. Y. 327, 333-339.

The owner of the certificates in Ohio is thus vested with valuable rights, differing from those of ordinary ownership, including those enforcible against the trustee within as well as without the State. They are brought within the control of the State. These rights, the physical certificates with which they are identified, and the receipt and enjoyment of their income by the owner, are each protected by Ohio laws. If we look to substance rather than form, to the principles which underlie and justify the taxing power, rather than to descriptive terminology which, merely as a matter of convenience, we may apply to the interest taxed, it would seem to be as much subject to the taxing power as any other intangible interest brought within the control and protection of the State, even though its ultimate economic enjoyment may be dependent wholly on property located and taxed elsewhere. See *Citizens National Bank* v. *Durr*, *supra*; *Maguire* v. *Trefry*, *supra*, 16.

It is unimportant what labels writers on legal theory, the courts of Ohio, or this Court may place upon this interest. The Fourteenth Amendment did not adopt as ultimate verities the quaint distinctions taken three centuries ago by Sir Edward Coke between things that savour of the realty and other forms of right, and between corporeal and incorporeal rights. In applying the Fourteenth Amendment we may recognize, what he failed to realize, that all rights are incorporeal, and that whether they are rightly subjected to state taxing power must be determined by recourse to the principles upon which taxes have universally been laid and collected, rather than by the choice of a label which, by definition previously agreed upon, will infallibly mark the interest as non-taxable.

In every practical aspect—and taxation is a practical matter—the trust certificate holder stands in the same relationship to the land as the stockholder of a land owning corporation. It is not denied that the petitioner receives as much benefit and protection from the State of Ohio with respect to his certificates as does the owner of corporate stock, or that his interest is as much within the reach of the state power. Only by resort to subtle refinements of legal doctrine, devised without reference to the problems of taxation and irrelevant to them, or by treating the Fourteenth Amendment as an instrument for giving effect to our own peculiar convictions of what is morally or economically desirable, is it possible to sustain the taxation of the one and not the other.

Even though the tax be destroyed so far as it is imposed on petitioner's interest in the trusts of lands outside of Ohio, it cannot, for any reason advanced to support that conclusion, be deemed invalid as applied to appellant's interest in the Ohio trusts. The opinion of the Court suggests no other reason.

Whatever name we may give to the interest taxed, Ohio is not without jurisdiction of the land, the trustee, the certificates, or the owners of them. All are within the state. The objection to double taxation by a single sovereign is no more potent under the Fourteenth Amendment than the objection that a tax otherwise valid has been doubled. See *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 72; *Magnano Co.* v. *Hamilton*, 292 U. S. 40. The imposition of a tax on a particular interest in land already taxed *ad valorem* does not infringe any constitutional immunity. *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407, 413 and cases cited.

The fact that the certificates are taxed, and the owners of interests in trusts of land not represented by certificates are untaxed, plainly involves no forbidden discrimination. The owners of transferable certificates, representing an equitable interest in a trust of land divided into shares, enjoy privileges and advantages not attaching to other forms of ownership, which are an adequate basis for a difference in taxation. See *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Bells Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 606; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 572; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537.

The judgment now given cannot rest on the Delphic concession of counsel, that the State has "no power to tax land or interests in land situate beyond its borders," and that, if situate within the State, there is no power to tax them "in any other manner than by uniform rule according to value." The concession, so far as it relates to the Ohio trusts, plainly has reference to requirements of the state and not the federal Constitution. For the Fourteenth Amendment does not restrict a state to the taxation of all interests in land uniformly according to value.

We are not concerned with the validity of the tax under the state constitution. The state court has plenary power to settle that question for the litigants and for us, *Withers* v. *Buckley*, 20 How. 84, 89; *Pennsylvania College Cases*, 13 Wall. 190, 212; *Walker* v. *Sauvinet*, 92 U. S. 90; *Southwestern Oil Co.* v. *Texas*, *supra*, 119, as it has done by sustaining the tax. No concession of counsel about his theory of the law requires us to adopt his theory, however mistaken and irrelevant, for decision of the federal question which is alone before us. None can confer on us jurisdiction to review on appeal the decision of a state question by the highest court of the State, or excuse the abuse of power involved in our reversing its judgment on state grounds.

The objections to the tax affecting the Ohio trusts present no substantial federal question, or any which the Court has deemed it necessary to consider. The tax affecting the extra-state trusts should be sustained as not infringing any constitutional guarantee.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.